(24,036)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 346.

ALBERT B. MOSS AND FRANK C. MOSS, COPARTNERS UNDER THE NAME AND STYLE OF A. B. MOSS & BRO., PLAINTIFFS IN ERROR,

vs.

ALFRED H. RAMEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 14, 1914.

a In the Supreme Court of the United States.

A. B. Moss & Brother, Plaintiffs in Error,
vs.
A. H. Ramey, Defendant in Error.

Transcript of Record.

In Error to the Supreme Court of the State of Idaho.

1 *Writ of Error.*

The United States of America, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the State of Idaho, before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between Albert B. Moss (designated as A. B. Moss) and Frank C. Moss, copartners under the name and style of A. B. Moss & Bro., plaintiffs and respondents, and Alfred H. Ramey (designated as A. H. Ramey), defendant and appellant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Albert
2 B. Moss and Frank C. Moss, copartners as aforesaid, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same in the said Supreme Court at Washington within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 12th day of December, in the year of our Lord one thousand nine hundred and thirteen.

[Seal United States District Court, Idaho. 1890.]

A. L. RICHARDSON,
Clerk of the District Court of the United States, District of Idaho,
By —— ——, *Deputy.*

Allowed this 12th day of December, 1913.

J. F. AILSHIE,
Chief Justice of the Supreme Court of the State of Idaho.

2½ [Endorsed:] No. 2069. In the Supreme Court of the State of Idaho. A. B. Moss & Brother, a co-partnership consisting of A. B. Moss and Frank C. Moss, Plaintiffs in Error, vs. A. H. Ramey, Defendant in Error. Writ of Error. Filed Dec. 12, 1913. I. W. Hart, Clerk. By —— ——. Richards & Haga, Boise, Idaho.

3 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Idaho, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court, in the City of Boise, this 24th January, 1914.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk of the Supreme Court of the State of Idaho.

Costs of Suit.

Plaintiffs' Costs, $23.25, Paid by A. B. Moss & Brother.
Defendant's Costs, $144.20, Paid by A. H. Ramey.
Costs of Transcript, $22.50, Paid by A. B. Moss & Brother.

I. W. HART,
Clerk Supreme Court, Idaho.

4 In the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Canyon.

A. B. MOSS AND BROTHER, a Copartnership Consisting of A. B. Moss and Frank C. Moss, Plaintiffs,

vs.

A. H. RAMEY, Defendant.

Complaint.

Come now the above named plaintiffs and complain of said defendant, and for cause of such complaint allege:

I.

That the said plaintiffs now are and for a long time heretofore have been copartners under the firm — and style of A. B. Moss & Brother.

II.

That the said plaintiffs now are and for a long time heretofore have been the owners, in the possession and entitled to the possession of those certain pieces and parcels of land situate, lying and being in the County of Canyon, State of Idaho, and particularly described as lots 3 and 4 of section 22, and lots 1 and 2 of section 27, and lots 1 and 2 of section 28, and lot 1 of section 33, all in township 8 north of range 5 west, B. M., according to the official plat of the survey of said land returned to the United States General Land Office by the Surveyor General, the said lots and each of them lying along
5 and bordering on the right bank of the main channel of Snake River.

III.

That the said lots 1 and 2 of section 28, and lot 1 of section 33, township 8 north of range 5 west, B. M., were duly and regularly filed upon by one Roswell P. Clement under the laws of the United States, who subsequently thereto and on the — day of ——, 1889, received a patent to said lots from the United States Government, and subsequently thereto and on or about the 6th day of July, 1891, duly conveyed the said lots by warranty deed to the plaintiffs herein.

IV.

That the said lots 1 and 2 of section 27, and 3 and 4 of section 22, township 8 north of range 5 west, B. M., were duly filed upon by one Frank Herron under the land laws of the United States on the 11th day of November, 1890, and a patent to said tracts was duly issued to said Frank Herron on the 1st day of April, 1892, and the said Frank Herron on or about the 28th day of May, 1892, duly and regularly conveyed the said lots and each of them by warranty deed to the plaintiffs herein.

V.

That these plaintiffs and their predecessors in interest have at all times and continuously since receiving title thereto from the United States Government, been the owners, in the possession and entitled to the possession of the said lots and each of them and the appurtenances thereunto belonging.

VI.

That the said defendant claims some interest or right
6 in and to that portion of the said lots lying along and bordering on the right bank of the main channel of Snake River, and extending from near the south line of lot 1, of section 33, northerly to a point some distance south of the north line of lot 3, section 22, and extending easterly from the said right bank of the main channel of Snake River to a ravine or slough passing through and lying wholly within said lots, and connecting at both ends of such ravine or slough with the main channel of Snake River; but the claims of said defendant are without any right whatever, and are unjust and unfounded, and are a cloud upon plaintiffs' title thereto, and the said defendant has not any estate, right, title or interest whatsoever in said lots or any of them or any part or portion thereof, or of the tract above described.

VII.

That that portion of the main channel of Snake River lying within the north and south boundaries of the tract of land described in paragraph 2, of this complaint, extended westerly across said river, is not navigable, and the westerly limits of said lots extend to the center line of the main channel of said Snake River, and the said Snake River in the vicinity of said lots is not a navigable stream.

Wherefore plaintiffs pray:

1. That the defendant may be required to set forth the nature of his claim, and that all adverse claims of the said defendant may be determined by a decree of this court.

2. That by said decree it be declared and adjudged that said plaintiffs are the owners in fee simple of the said lots 3 and 4 of section 22, of lots 1 and 2 of section 27, and lots 1 and 2 of section 28, and lot 1 of section 33, all in township 8 north of
7 range 5 west, B. M., Canyon County, Idaho, from the easterly boundary of said lots to the center line of the main channel of Snake River and the whole thereof, and that the said defendant has no estate or interest whatsoever in or to the said lots or any part or portion thereof.

3. That the said defendant and all persons claiming under or through him be forever enjoined and debarred from asserting any claim whatever in or to the said lots and premises or any part thereof adverse to these plaintiffs, and for such other and further

relief as to this honorable court shall seem meet and proper, and for their costs in this behalf expended.

RICHARDS & HAGA,
Attorneys for Plaintiffs.

(Duly verified.)

(Filed February 23rd, 1905.)

8 In the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Canyon.

A. B. MOSS AND BROTHER, a Co-partnership, Consisting of A. B. Moss and Frank C. Moss, Plaintiffs,
vs.
A. H. RAMEY, Defendant.

Amended Answer.

Comes now the defendant, and answering plaintiffs' complaint, admits, denies, and alleges:

1.

Defendant denies that plaintiffs, or either of them, or their, or either of their predecessors in interest, are now the owner, or owners, or in the possession of, or entitled to the possession of, that tract of land, or island, lying and being situate west of the east channel of Snake River as described in paragraph Six of plaintiffs' complaint herein, or any part thereof.

2.

Defendant admits that defendant claims to be the owner of all that certain tract of land along and bordering the right bank of the larger channel of Snake River, extending easterly to what is alleged in paragraph six of the complaint as a ravine or slough, consisting of about one hundred and sixty acres, more or less, of an island between the two channels of Snake River, which defendant alleges lies westerly from Sections 27 and 28, in Township 8 North of Range 5 West of Boise Meridian, but denies that defendant's claim
9 to said island is unjust or unfounded, or without right, or that defendant has not any right, title, estate, or interest therein.

3.

Denies that plaintiffs, or either of them, have any right, title, or interest, whatever, in any portion of said tract of land, or island, lying west of that certain channel of Snake River running easterly and bordering on said Lots Three and Four in said Section 22, Lots One and Two of said Section 27, and Lots One and Two in said Section 28.

Furthering answering plaintiffs' complaint, and by way of affirmative defense, defendant alleges:

1.

That at all the times since the year 1893, the defendant has had continuous, actual, open, adverse, notorious, and exclusive possession of all that certain island above described, lying west of and adjoining that certain channel of Snake River west of Section 27, Township 8 North of Range 5 West of Boise Meridian, under claim of ownership as against the plaintiffs, and each of the plaintiffs, and their, and each of their, predecessors in interest, and as against all other persons whatsoever, and plaintiffs are barred of any right to bring an action therefor under the provisions of Sections 4036, 4037, and 4043 of the Revised Statutes of the State of Idaho.

Furthering answering plaintiffs' complaint, and for a further affirmative and a second defense, defendant alleges:

1.

That plaintiffs should not be permitted to allege that they own or claim any interest, whatever, in any part of that certain island bordering on and lying west of said east channel of said Snake River west of the lots described in plaintiffs' complaint, for the following reasons:

That said island now claimed, owned, and occupied by the defendant has been in the defendant's possession under claim of ownership at all the times since the year 1893, all of which plaintiffs, and each of plaintiffs, and their predecessors in interest, have had due notice and knowledge.

2.

That neither of plaintiffs, nor any of their predecessors in interest ever claimed or established any right whatever in and to any portion of said island.

3.

That on the — day of ——, 1895, the plaintiffs, recognizing that said island was no part or parcel of said lots, for the purpose of procuring title thereto caused one Ruth Moss, wife of Frank C. Moss, one of the plaintiffs herein, to attempt to enter the same under the Desert Land Laws of the United States; that the Land Department rejected said application on the ground that the same was not desert land. That immediately thereafter, on the — day of ——, 1895, plaintiffs and their predecessors in interest, abandoned all claim to said island, and have never asserted any right or title therein to any portion of the same until the commencement of this action.

4.

That defendant since, believing and relying upon the acts of plaintiffs and their predecessors in interest, expended a large amount of money, in the sum of about $2,000.00, and time and labor in the improving and cultivation of said island by building a
11 residence thereon, plowing the land, and cultivating the same, to crops, all of which expenditures were made, and labor performed, with the full knowledge and acquiescence of plaintiffs and their predecessors in interest, and in the full belief and reliance of defendant upon the fact that neither the plaintiffs, nor any of their predecessors in interest had any claim whatever to any portion of said island.

Wherefore, having answered plaintiffs' complaint, defendant prays that he may have judgment, and for his costs and disbursements herein.

W. H. BROOKE,
Attorney for Defendant,
Residing at Ontario, Oregon.
SMITH & SCATTERDAY,
Attorneys for Defendant,
Residing at Caldwell, Idaho.

(Duly veried.)
(Filed December 5th, 1908.)

12 No. 2039.

In the Supreme Court of the State of Idaho, May Term, 1912.

A. B. Moss and Brother, a Co-partnership, Consisting of A. B. Moss and Frank C. Moss, Plaintiffs and Respondents,
vs.
A. H. Ramey, Defendant and Appellant.

Transcript on Appeal.

Appeal from the District Court of the Seventh Judicial District of the State of Idaho in and for the County of Canyon.

Karl Paine and R. B. Scatterday, Attorneys for Appellant.
Richards & Haga, Attorneys for Respondents.

Filed June 24, 1912. I. W. Hart, Clerk. By F. J. Millsaps, Deputy.

13 & 14 In the Supreme Court of the State of Idaho, May Term, 1912.

A. B. Moss and Brother, a Co-partnership, Consisting of A. B. Moss and Frank C. Moss, Plaintiffs and Respondents,

vs.

A. H. Ramey, Defendant and Appellant.

Transcript on Appeal.

Appeal from the District Court of the Seventh Judicial District of the State of Idaho in and for the County of Canyon.

Karl Paine and R. B. Scatterday, Attorneys for Appellant.
Richards & Haga, Attorneys for Respondents.

15 In the District Court of the Seventh Judicial District of the State of Idaho in and for the County of Canyon.

A. B. Moss and Brother, a Co-partnership, Consisting of A. B. Moss and Frank C. Moss, Plaintiffs and Respondents,

vs.

A. H. Ramey, Defendant and Appellant.

Findings of Fact and Conclusions of Law.

This cause having been called regularly for trial before the Court, (a jury having been expressly waived by the parties) Messrs. Richards & Haga appearing as attorneys for the plaintiffs, and Messrs. Smith & Scatterday and W. H. Brooke, Esq., appearing as attorneys for defendant, and the Court having heard the proofs of the respective parties, and considered the same, and the records and papers in the cause and the arguments of the respective attorneys thereon, and the cause having been submitted to the Court for its decision, the Court now finds the following facts:

Findings of Fact.

1.

That the plaintiffs, A. B. Moss and Frank C. Moss, now are, and at the time of the commencement of this action were, and for a long time prior thereto, had been, co-partners under the firm name and style of A. B. Moss & Brother.

2.

16 That Lots 1 and 2 of Section 28, and Lot 1 of Section 33, Township 8 N., Range 5 W. B. M., were duly filed upon by one Roswell P. Clement, under the land laws of the United

States, and subsequently and on the — day of ——, 1889, the government of the United States issued to the said Roswell P. Clement a patent covering such lots and that portion of said lots included in the tract of land particularly described in Finding No. 6.

3.

That subsequent and on the 6th day of July, 1891, the said Roswell P. Clement duly conveyed the said premises and the legal title thereto to the said plaintiffs by a warranty deed.

4.

That Lots 1 and 2 of Section 27 and Lots 3 and 4 of Section 22, Township 8 N., Range 5 W. B. M., were duly filed upon by Frank Heron, under the land laws of the United States, and subsequently and on the 1st day of April, 1892, the United States Government issued to the said Frank Heron a patent covering the said premises and that portion of said lots included in the tract of land particularly described in Finding No. 6 hereof.

5.

That subsequent and on the 28th day of May, 1892, the said Frank Heron duly conveyed the said lots and the legal title thereto to the said plaintiffs.

6.

That the said lots and premises above described lie along and border the right bank of the main channel of Snake River,
17 and extend westerly to the center of the main channel of said river, and the following described tract is a part of the premises above described and was conveyed to plaintiffs by the said grantors, to-wit: That certain tract described in Paragraph VI of the complaint herein, and which extends from a point near the south boundary line of Lot 2 of said Section 28 northerly to a point near the north boundary line of Lot 1 of said Section 27, and westerly from the Government meander line on said Lots 1 and 2 of Section 27, and Lots 1 and 2 of said Section 28, to the center of the main channel of Snake River.

7.

That Snake River opposite said lots is, under the laws of this state, a navigable stream.

8.

That the said defendant never occupied the said premises, or any part thereof, under a claim of title exclusive of any other right, or otherwise; and he never occupied any part of said premises, or claimed possession thereof under a claim of title, or upon any other ground than that he believed a portion thereof to be a part of the unsurveyed public domain. And said defendant at no time had

any intention of acquiring title to any of the land of the plaintiffs herein, and said defendant made no effort and took no step whatsoever to acquire title to that portion of said premises which he occupied for a time under the erroneous belief that it was a part
18 of the unsurveyed public domain.

9.

That the said defendant has not for as long as five years at a time, or for any period more than a few months or a year, without interruption, had continuous, actual, open, adverse, notorious or exclusive possession of any part of the lands herein described, or referred to in defendant's answer, under a claim of title, or otherwise.

10.

That the said defendant did not protect any of the premises herein described, or that portion thereof described in Paragraph VI hereof, with substantial enclosures, nor did he have exclusive or adverse possession thereof, or of any part thereof, continuously for five years immediately preceding the commencement of this action, or for any other period of five years. And the said defendant has not paid any of the taxes levied or assessed against the said premises.

11.

That during the five years immediately preceding the commencement of this action, and ever since the said premises were acquired by plaintiffs from their grantors as hereinbefore stated, the said plaintiffs have used the said premises herein described, and the whole thereof, for pasturing stock and for grazing and other purposes.

12.

That the said plaintiffs, nor the predecessors in interest,
19 have at no time abandoned their claim to said premises, or any part thereof, and the said defendant made no expenditures whatsoever on said land, referred to in the answer as an island, because of any action, statement, or conduct of the said plaintiffs.

13.

That all of the allegations contained in the complaint, except as herein otherwise found, are true, and all the allegations of the answer and the several defenses therein pleaded are untrue.

Conclusions of Law.

As conclusions of law from the foregoing facts, the Court finds, and decides:

1.

That the said plaintiffs are the owners and entitled to the possession of the lots and tracts of land hereinbefore described, and

the whole thereof, and that the said lots of plaintiffs extend westerly to the center of the main channel of Snake River. And the said defendant has no right, title, claim, or interest therein, or any part thereof.

2.

That the said plaintiffs are not barred of any right to bring this action by Sections 4036, 4037, or 4043, or any other provision or provisions of the Revised Statutes of the State of Idaho.

3.

That the said plaintiffs are entitled to a decree as prayed for in their complaint, to quiet their title to said land and premises, and the whole thereof, against the said defendant and all persons
20 claiming, or to claim, the same, or any part thereof, under or through the said defendant. And said plaintiffs are entitled to judgment for costs.

And judgment is hereby ordered to be entered accordingly.

Done this 1st day of May, 1911.

ED. L. BRYAN, *Judge.*

Filed May 1, 1911.

Decree.

(Title of Court and Cause.)

This cause having been regularly called and tried by the Court, and the findings of fact and conclusions of law and the decision thereon, in writing, having been duly rendered by the Court, which are now on file in this cause, wherein judgment was quieted in favor of the plaintiffs and against the defendant, as prayed for in the complaint.

Now, therefore, on motion of Messrs. Richards & Haga, Attorneys for plaintiffs,

It is hereby ordered, adjudged and decreed that the said plaintiffs have judgment as prayed for in their complaint herein, against the defendant, A. H. Ramey; that all adverse claims of the defendant, and of all persons claiming, or to claim, said premises, or any part thereof, through or under said defendant, are hereby adjudged and decreed to be invalid and groundless; and that the said plaintiffs be, and they are hereby declared and adjudged to be the true
21 and lawful owners of the land described in the complaint, and hereinafter described, and every part and parcel thereof, and that their title thereto be adjudged to be quieted against all claims, demands, or pretensions of the defendant, and the said defendant, and all persons claiming, or to claim, said premises, or any part thereof, through or under him, are hereby perpetually enjoined, restrained and stopped from setting up any claims thereto, or to any part thereof. The said premises are particularly described as follows: Lots 3 and 4 of Section 22, Lots 1 and 2 of Section 27, Lots 1 and 2 of Section 28, and Lot 1 of Section 33, Town-

ship 8 N., Range 5 W., B. M., Canyon County, Idaho, and all those tracts and parcels which lie between the Government meander line on said lots and the center of the main channel of the Snake River, the westerly boundary of said lots.

And it is hereby further ordered, adjudged and *declared* that the plaintiffs do have and recover their costs, hereby taxed at — Dollars ($—) against the defendant, A. H. Ramey.

Done this 1st day of May, 1911.

ED. L. BRYAN, *Judge.*

Filed May 1, 1911.

(Title of Court and Cause.)

Notice of Intention to Move for New Trial.

To A. B. Moss and Brother, a Co-partnership, Consisting of A. B. Moss and Frank C. Moss, Plaintiffs, and to Messrs. Rich-
22 ards & Haga, Plaintiffs' Attorneys:

You, and each of you, will please take notice that the defendant, A. H. Ramey, intends to, and will, move the above entitled court to vacate and set aside the decision, judgment and decree heretofore rendered and entered herein, and to grant a new trial of said cause, upon the following grounds, to-wit:

1. Accident or surprise, which ordinary prudence could not have guarded against.

2. Newly discovered evidence material to the defendant which could not, with reasonable diligence, have been discovered and produced at the trial.

3. Insufficiency of the evidence to justify the decision of the court.

4. That the decision of the Court is against law.

5. Errors in law occurring at the trial and excepted to by the defendant.

6. That this Court did not have jurisdiction in the premises.

Said motion will be made upon affidavits hereafter to be filed and served upon you; on the records and files in the action; upon the minutes of the court; upon a bill of exceptions and statement of the case hereafter to be prepared; or, said motion will be made on any, either, or all of said showings, i. e., affidavits to be filed and served, records and files in the action, minutes of the court, a
23 bill of exceptions, and statement of the case hereafter to be prepared.

BROOKE & TOMLINSON,
SMITH & SCATTERDAY,
Attorneys for Defendant.

Due and legal service of the above and foregoing notice and receipt of a copy thereof, admitted this 10th day of May, 1911.

RICHARDS & HAGA,
Attorneys for Plaintiff-.

Filed May 10, 1911.

(Title of Court and Cause.)

Statement on Motion for New Trial.

This cause came on regularly for trial before the Court without jury on the 4th day of June, 1909, Messrs. Richards & Haga appearing as counsel for the plaintiff; and Messrs. W. H. Brooke and Smith & Scatterday, appearing as counsel for the defendant. Whereupon the following proceedings were taken:

(Title of Court and Cause.)

Testimony.

A. B. Moss, called as a witness for the plaintiff, and after being first duly sworn, testified as follows:

I am one of the plaintiffs in this case. Mr. F. C. Moss is my brother. We are joint owners and claim to be joint owners of the property in question. He is interested with me in whatever property rights I have in this land.

Plaintiff offers in evidence Patent from the United States
24 to Roswell Clement for lot numbered 1 of Section 33, and lots numbered 1 and 2 of Section 28, T. 8 N., R. 5 W., B. M., recorded in Book 1 of Patents at Page 142 of the records of the County Recorder's office of Canyon County, as Plaintiff's Exhibit "1." Permission given to substitute a certified copy of the record.

Plaintiff also offers a warranty deed from Roswell Clement and wife to A. B. Moss and brother for the lands described in the patent, Exhibit "1," as Plaintiff's Exhibit No. 2.

Plaintiff also offers as Exhibit No. "3" a patent from the United States Government to Frank Herron for lots numbered 1 and 2 of Section 27, and lots numbered 3 and 4 of Section 22, T. 8 N., R. 5 W., B. M., the same being recorded in Book 1 of Patents at Page 543 of the records of the County Recorder's office of Canyon County, Idaho.

Permission given to substitute certified copy.

Plaintiff also offers as Plaintiff's Exhibit "4" a warranty deed from Frank Herron to A. B. Moss and C. F. Moss for the lots and lands described in the patent offered as Exhibit No. "3."

No objections, and the exhibits are admitted.

We are still owners of the lots described in these various patents and deeds. These lots are situated with relation to Snake River directly along the Snake River.

Plaintiff offers in evidence blue print of the original plat showing
25 the location of the lots in question relative to the Snake River, as shown by the U. S. Surveyor General, and offers the same in evidence as Exhibit "5."

No objection.

Yes, I can tell from an examination of Exhibit No. 5 where the land described in the complaint in controversy in this action is situated relative to the lots which my brother and I have purchased from Mr. Clements and Mr. Herron. The island is practically opposite the lots, all except the north lot and the south lot. Both these lots are below, one below and one above the land in controversy. The mainland which we own extends further north and south. One lot further north and one lot further south, or practically that. There is practically a lot north and one south of the island. The island lies east of the main channel of Snake River. It lies substantially opposite Section 27; I think possibly that section would cover the island; it might run a little bit below the line of the section and a little above, but just a shade, that would practically cover it. I should say there are from 100 to 120 acres in the island. It is somewhat irregular in shape. The island is not shown on the government plat.

Cross-examination:

I am part owner of the land described in these two patents and shown by these two deeds. I have not sold this property since the commencement of this suit. There is a portion of this property which has been deeded from Frank C. Moss in a division. He took some other property and I took some, but the property
26 in front of that island is still A. B. Moss and Brother property. All of this property, except the Roswell Clement property, that is still A. B. Moss and Brother, and Frank Herron deeds belong now wholly to me, dated, I should think, on the deed about 6 or 8 months ago, I don't remember the exact date. I didn't deed any property to George Rezac. Frank Moss deeded it. It was his half interest in the Roswell Clement place, and is now in the hands of a trustee, but it is still Frank Moss. Frank Moss gave a trust deed for the property, described in the Roswell Clement deed. One-half of the legal title to this property as shown by the Clement deed is in George Rezac, as trustee. The island is separated from the mainland in this way. Snake River comes around against the bluff on the Idaho side. It then turns and goes right back again, toward the Oregon side, following in that shape around, when the river turns and goes toward the Oregon side. There is a channel washed down in high water times. Down a little ways it splits and runs off into another channel, and down below here there is one channel, here is another. That is two little channels on the Idaho side of the island and the Idaho side of the river. They come together into the river again about where the river comes back again against this high bluff, that runs all along here.

Redirect by Mr. HAGA:

The description in the complaint, Paragraph 6 of the complaint, which reads as follows, substantially covers the land in con-
27 troversy: "That portion of the said lots being the lots described in the patents and deeds, lying along and bordering on the right bank of the main channel of Snake River, and extend-

ing from near the south line of Lot 1, Section 33, northerly to a point some distance south of the north line of Lot 3, Section 22, and extending easterly from said right bank of the main channel of Snake River to a ravine or slough passing through and lying within said lots and connected at both ends of said ravine or slough with the main channel of Snake River," except that it does not go as far north or south as the lots do.

Witness excused.

Plaintiff rests.

Motion for non-suit. Motion denied. Exception.

Testimony for the Defendant.

J. A. MORTON, called as a witness for the defendant, and after being first duly sworn, testified as follows:

I have been residing in Boise the last year. I have been acquainted with the Snake River forty odd years. I have known this island known as "Ramey Island" for forty odd years. I do not think the east channel has changed any, since I first saw it, to amount to anything. It looks about the same to me as it did when I first saw it. I know something of the premises in controversy between Mr. Moss and Mr. Ramey. I lived right west, or nearly right west, of the premises on the opposite side of the river. This
channel between the mainland and this "Ramey Island,"
28 the east channel, I could not tell you just how wide it was.
Quite a small channel. I would suppose it was probably 100 feet wide from the tops of the banks. It kind of slopes, although I never measured it. Yes, the water runs through when the river is up some. It don't run through when the river is low. There are times when the water does not really run through the channel at low water time. I have seen it perfectly dry at low water. In looking at the channel east of the island I have seen it when there wasn't a drop of water running in it. Yes, sir, the water backs up from the river down near the mouth of this channel. The water backs up. There is always water in there. There is only a portion of the east channel which ever goes dry. The upper end near the river gets very low. The water does not run into it above, but it backs up from below a ways. I have seen three or four hundred yards of this channel dry. The banks of the island side are perfectly straight up and down. Other places they slope. I have discovered fences there along the east bank, where the bank slopes so it would not keep stock from climbing up and down. There were places which had perpendicular faces so it made a fence of itself. I have been acquainted with the property from 1894 to 1904. That is the part of the time I have been testifying to as to the condition of this property. During that time and before, I was acquainted with the
property. Pretty soon after Mr. Ramey went there. He
29 made more or less fences to keep the stock from crossing it on to the island. I think he went there in 1894 or 1895.

Q. I wish you would describe the condition of the banks of this island and the fences along there with reference as to whether or not they would turn stock.

A. Why, yes, it did turn stock, enough so Mr. Ramey raised a crop there. Part way the banks were steep enough so stock would not cross. Other places where they are a little more sloping stock could cross, but that was fenced to prevent it. I think Mr. Ramey—I didn't see him put it there, but as he was there farming on the island I suppose he did. That was at the time Mr. Ramey was there on the island; farming on the island. I think he kept those fences and the banks in that condition during the time he was there. During between 1894 and 1904. He built a house and a stable or barn, something that would answer as a barn, and corrals, and such as that, for stacking his grain and hay. I couldn't tell how much the house would cost. It was a house him and his family lived in. I don't think I could tell how many rooms. I never was in it. Mr. Ramey cleared off a good deal of willows off of a portion of that that he farmed. I couldn't tell how many acres he did farm. The island, when I first knew it, had patches of willows, there was a good deal of willows, brush and timber on it. I could not hardly
30 give an estimate of how many acres he cleaned off between 1894 and 1904, probably twenty acres. It may have been more, or less. It might have been thirty or forty acres, but that is more than I can say.

Cross-examination:

I have not been on the island for three or four years. I was not on the island very frequently. Sometimes I had to go on there after cattle. I lived right across opposite. I lived on the Oregon side. Cattle swam the river. They went across the main channel, and sometimes went across the ice in the winter. I think I was on the island during 1894. I remember what I saw there at that time. One thing I saw: I had a couple of scows and a wheel I built for mining, and the river got very high and they drifted; broke them loose from the bank and they drifted down and lodged on the mainland, and I was over there and took my wheel down and moved it. I think Mr. Ramey was living on the island at that time. Mr. Ramey came to where I was to work. I was working on the outside of the island, but I crossed back and forth across the point of the island. I was working several days in there. The upper end of the island, and just below the point of the Morton island. I was on the Idaho side of the mainland where I was working. In going from the Oregon side to the Idaho side, I crossed it pretty near to the extreme upper end. I saw Mr. Ramey where I was working on the mainland on the Idaho side. He was pretty close to me, if I recollect right, when
31 I first saw him. I don't know where he came from at that time. I saw some fence on the island at that time. I didn't follow along the island its entire length to see what was fenced. What fence I saw was pretty near the extreme upper end. I saw a fence that would keep stock from crossing the channel. It consisted of posts and wire and willows, brush, etc. I don't re-

member how many wires. I couldn't tell how far the posts were apart. It would keep cattle and horses from crossing. I didn't follow the channel but a short distance. Come in a boat from my place and landed pretty near the upper end of the island, but, of course, walked across to where I was at work. I had no occasion to particularly notice the fences. I was going over there to get my property back. I am fixing the date by the high water. I am not right positive it was in 1894, but I think it was. We had pretty high water in '94 that overflowed the bottoms. I was there in '95. I mined the land on the Oregon side in '95. I think probably I was over on the island, I had a skiff to run back and forth in; I was prospecting the land and I went over on the east channel in 1895, over on the Idaho side at the east channel, had been placer mining there before, some prospecting. I don't think they mined it any then. I don't think I saw the channel down more than a quarter of a mile, from the extreme upper end. I think it was in August. I don't think there was any water running through the channel, very little, if any. I had no occasion at that time to observe the fences, or take any notice. I probably wasn't there more
32 than two or three hours, I don't recollect. No, it wasn't the winter then. I used to cross back and forth in my boat.

Q. Did you cross back and forth? You crossed the river and went between the north island and this island, didn't you, not across the channel? You didn't cross the east channel or the west channel and then walk across the island and through the east channel again, did you?

A. Only when it was dry.

Q. When you went in your skiff you always went above the island?

A. Yes, when there was water running through the east channel, I either had to cross above it, or run my boat into the head of the two channels. I frequently did that. I was going across to get on the mainland for some purpose or other. I was there in '96.

Q. Crossing the same way?

A. I guess I didn't cross after that. Didn't cross there probably more than half a dozen times during the year. I had no reason for particularly noticing fences on the east channel up and down the island, along the side of the island. I never saw anyone building those fences. I don't know of my own knowledge who built the fences. I didn't see anyone building the fences.

Redirect:

During the time between '94 and for the next few years, Mr. Ramey and his family lived on this island. I don't know
33 until what time, but I know Ramey and his family lived on the island and Mr. Ramey worked at the hatchery on the Oregon side. I don't believe I can tell just when the fish hatchery was built. I don't remember how long Ramey lived on that island. I couldn't say exactly. Probably two or three years. It may be more. I wasn't there all the time. Mr. Ramey lived there at the time the fish hatchery was built.

Recross-examination:

I don't know as a matter of fact that he did live there. I know that he worked at the hatchery and, also, that his family was on the island around the house. It is only a short distance across.

Q. You saw his family there at that time?
A. I think I did.
Q. Are you positive of it?
A. I am pretty positive.
Q. Who did you see there?
A. A woman and children.
Q. Did you ever go over to the house to see?
A. No, sir, I didn't go over. I don't know as I went to the house when Mr. Ramey was living there, but I met him frequently. I know about him living there from what he told me or others told me. I could not say there was a family living in the house. I could look across from the hatchery and see there was a family living there.

Witness excused.

J. S. MILLIKIN, called as a witness for the defendant, and being first duly sworn, testified as follows:

34 I am a civil engineer and reside at Ontario, Oregon. I have been a civil engineer for twenty or thirty years. I was a civil engineer from 1894 to 1905. This blue print marked Defendant's Exhibit "A," I made the original of that for the survey I made for Mr. Ramey in 1905. The original map was taken from the notes of the survey and the field notes of the government survey.

By Mr. SMITH: The original map that was made was used by the Supreme Court when the case was argued, and has never been returned, and by agreement of counsel we are permitted to introduce this, with the privilege of substituting later on.

Mr. HAGA: There are no objections to the blue print; there may be objections for other reasons.

That tract bounded by the lines used to designate water is a channel around Morton Island. That is the main channel of Snake River. These are some channels that run east and south of what is termed "Ramey Island." I think the survey must have been made in August or September. The condition of the east channel to the point where the channel is doubled, or where there are two channels, up to about that point is swampy, made so from the water backing up from the lower part of the river to this point. It backs up some. I didn't examine closely, but it backs up there near to that point, about the center line of Section 27, it is quite swampy.

35 The channel at the head is about 400 feet wide where the channels, the two channels, break out, where there is an intake from the river, and later on all the way down from 150 to 140 feet, the inside channel. The map is practically on a scale. There is a crossing right here where we put the center line of 27, and practically that line is where the cattle or something has worn

the bank down until you can walk up it, but above that the bank is sufficient to keep you from walking up, or even climbing up, unless you have a ladder. It is abrupt from here on up north to the point of the field at the south end of the island. I noticed, at the time I made this survey, a fence. I had to hand my machine over the fence, and I remember some of them helped hold my machine until I got over the fence. It was a barbed wire fence. I didn't remember how many wires. It wasn't much of a fence, but like many others. It had some signs of being aged. I didn't pay much attention to that.

Q. Did you notice anything of any cultivation on the island?

A. Yes. I was on the north and east boundary of the island just prior to making the survey. I think it was 1903. I noticed some stubble there. If you will allow me, I will tell it as I can. I found that I wanted to get Mr. Ramey to show me the corner on the Oregon side in order to survey for the fish hatchery; I took data for the dams, etc. I was over on the island on that occasion. The hatchery was built, I think, in 1902. I don't think I noticed the
36 house on the island at that time. I was never on the island prior to the time I made the survey for Mr. Ramey. I was never on the island except in 1903 and 1905. I have never been there since.

Cross-examination by Mr. HAGA:

I was never on the island except the two times I testified to. I was there in 1903, when I went to get Ramey, and I was there in 1905, when I made the survey. I went over there while I was surveying for the hatchery, and Mr. Ramey came over himself from the Oregon side from the island. I didn't see any fence there at that time. I was not out on the island in 1903. I didn't see any fences there at that time. The fences I saw in 1905 are around on the north end of the island. There was a small part of the fence right in the north channel. I saw them down here. I didn't follow down there. This was an abrupt bank. He crossed if from the mainland on to the island. The line ran from the center of Section 27. That is the wire fence I described.

JOHN HALL, called as a witness for the defendant, and after being sworn, testified as follows:

I reside in Payette, Idaho. I first became acquainted with these premises in 1890, I believe, at first. I was acquainted with the island from 1890 up to 1903 or 1904. I took up a homestead on the N. E. ¼ of Section 27, and lived there until, I think, the fall of 1903 or the spring of 1904, I forget which. I don't remember any
37 change in the channel during that time. The banks on the east channel of the island side, part of them was high and straight enough to turn stock. There was places occasionally where the banks were sloping. There were fences put up in these places so as to turn stock. These fences were there filling these gaps during that time. Mr. Ramey put them in at times from the time I first moved on there. He put them in at times. I think he was

two or three years in putting them on it. Mr. Ramey went there in 1894. He lived there I couldn't say exactly how long, six or seven years, on the island. He had his family there. I could not say how wide the channel is. It is some little distance across. There may be two or three months of the year, I suppose, that there is no water in there, but the remainder of the year there is quite a little water. From the west end, or where the water starts from Snake River, the main channel is over a 100 feet wide, or more. I never paid any particular attention to it. On the side next to the main channel the bank is about the same as on the side next to the island. The bank here it is straight and prevents stock from crossing, and there is one or two places where stock would cross, and there was a fence put across on the mainland as well as on the island. Mr. Ramey build a house and put up a shed partially of lumber for hay for his horses, and these fences. He grubbed some of the land and I don't know how much he plowed, but that is the extent of it, as I remember. I couldn't say how many acres he grubbed.
38 The ground that he grubbed, part of it had some swales in it, and some of it was comparatively level. There was patches of willows on the land that he grubbed, but it seemed that there was patches too that there was nothing done to at all. In 1903 or 1904, I think, he had probably one-third of the island in cultivation. It would cost two or three dollars an acre to have the brush grubbed, but I don't know what they would charge for willows. I don't believe that I would know the value of the improvements on the island placed there by Mr. Ramey. I don't remember the size of the buildings. Mr. Ramey raised crops on this island every year during the time I lived there, and I began living there in 1894. During the time that I was there I don't know of anyone exercising any acts of possession on this island except Mr. Ramey.

Cross-examination by Mr. HAGA:

I was near the east line of Section 27. The house is on the half section line, the west half section line, of Section 27: I lived on the northeast quarter corner of Sec. 27. My house lies near the northwest corner of the place. I could not see the island from the house. I would have to go over on the high bluff to see the island. I had to go through Mr. Ramey's land. I think at that time Mr. Peddington owned the land between myself and Mr. Moss. Sometimes I would go over there every week once a week, some weeks I would not be there at all. That was as far as the east chan-
39 nel. I would go down to the bluff down to the east channel and hunt along the bottom and on the bluff. I couldn't tell exactly how often I did go clear over on the island. Occasionally. I could not tell how many times a year. Every year. I and Mr. Ramey, when he first moved there, would run a seine together in the river, and would occasionally come past there coming from fishing. We ran a seine on the Oregon side of the main channel, but he lived on the island. We would cross the river there and go over on his place. We didn't cross the east channel when we were seining. We generally crossed to the south and went around.

Q. You crossed on the Oregon side of the island?

A. No, sir. The way to the island at that time, you would go down the hill on the flat south of the island, then there was a roadway across there, onto the island.

Q. You had to cross the east channel to go on the island?

A. You might call it the east side of the island, but we crossed it on the south side.

Q. That was at the extreme upper end of the island?

A. No, sir. It was 20 to 30 rods down the main Snake River.

Q. Is that where the water washed up the gravel bed where you can drive over and see the water can't run through the channel except in high water time?

40 Defendant objects as improper cross-examination. Overruled.

A. Right where we crossed I don't remember any gravel bed washed there, but it may have been up closer to Snake River, the place like that.

Q. That was the occasion of your going on the island was to go over there to look up the seine you had in the river?

A. The occasion was to go over and see Mr. Ramey when he came in from running the seine. We run the seine on the Oregon side of the island, but we would cross over there and leave the seine on the Oregon side of the bank. We were doing that I think for two or three years. I don't remember just what years it was, but it was after he moved on the island, as near as I can tell you. I don't remember how long after he moved on the island. I don't know at that time of anybody else using the island.

Q. You don't know but what someone might be using it for pasture or other purposes?

A. I couldn't say, but I don't think they were. I never saw any cattle on the island only what belonged to Mr. Ramey. I didn't notice any of them, but some of them were his.

By Mr. BROOKE:

I couldn't tell you how many times a month I would see this island while I lived in that vicinity. Sometimes I would be over there most every days for a week or two, and there might be a month or six weeks I would not be over there at all.

41 By Mr. HAGA:

Q. There might be a year or two you didn't go on there at all?

A. No.

Q. Your observations of the island were made on top of the hill, on the bluff, mostly?

A. Well, partly, yes.

Mr. SMITH: How far is it from the top of this bluff you spoke of then to this island?

A. You go right down on the natural slope to the edge of the water, it would be diagonally across this channel.

Q. You state your principal observation in regard to the island was

from the top of this bluff; do you mean the court to understand in these matters you testify to that your observation when you crossed this island you followed oftener on the bluff than on the island, itself?

A. No, I was over at Ramey's house at different times, and noticed the fences and buildings and such as that; but I noticed from the bluff whether other parties were there or not.

Q. Did you notice from the bluff whether the land was cultivated?

A. Yes, I have been right on the land when it was cultivated. That is when there was grain growing there.

Q. Then your knowledge and observation of this island was obtained from observations from the bluff and also from actual
42 observations on the ground, is that what you mean?

A. Yes.

Mr. HAGA:

I seen Mr. Ramey working at the fences a time or two. I could not say what year it was. While I was living there between 1894 and 1905. Somewhere between 1894 and 1903. I never noticed anyone building fences there except Mr. Ramey. I was not living continuously on Section 27 from 1894 to the time I moved off in 1903, 1904. I was absent six or seven months once. I was in Alaska in 1898. I made one trip to Alaska. I was not away at any other time. I was working for wages. I would probably go out and work eight or ten days in the hay, but made my home there.

Mr. BROOKE:

Yes, sir, I noticed Mr. Ramey building the fences there. I went over to see him on some kind of business and he was working on that fence along back of the river.

Witness excused.

C. F. DRAPER, called and sworn as a witness for the defendant, testified as follows:

I live in Washo Bottom. I am acquainted with the premises in controversy. I became acquainted with them in 1894. I remember Mr. Ramey when I first went there in 1894. I have been acquainted with the island from 1894 to the present time. I supposed Mr. Ramey for all I know of has been living on that island since
43 1894. No one else that I know of. Mr. Ramey's family lived there. I think he lived there some six or seven years from 1894. There was no one on the island that I know of after Mr. Ramey and his family left there. There was no one except Mr. Ramey took any of the crops on the island after he left there. He did, as far as I know. There is no one living on the island since 1894, except Mr. Ramey and his family, that I know of. I would have known of it prior to the last two or three years. For the last two or three years I might not have known it. Mr. Ramey built a house and stable, granaries, some fence, grubbed and plowed on the place since going there. I could not say just how many acres. I should think about 20 or 30, more or less. I could not say just

how many acres he grubbed and plowed. He put those 20 or 30 acres into crop, some wheat, oats, barley and alfalfa. He pastured the balance of the land and cut some native wild hay. I don't know the value of the house he placed there. The condition of this east channel separating this island from the mainland in regard to its banks, in some places the banks are pretty steep and in others they are sloping.

Q. Do you know whether Ramey ever placed any fences on that island?

A. There were fences there after he went there on the island in these gaps or low places along the south and east channel. I don't know whether the fences covered all the gaps in the south channel or not. It would cover the low places where stock would go
44 up and down the bank. I could not say whether it covered all or not. I do not know of any places where stock could go up and down that it did not cover. These banks along that southeast channel were, in places, probably 8, 10 or 12 feet high. Other places were slanting. In regard to the height of the banks where that fence is placed were kind of sloping land where stock could go up and down. The main channel is about 6 or 800 feet by this island. At low water it would average, I should say, six feet. I never measured it. On the side of this island next the main channel there is a pretty well defined bank and steep, if I remember right. This channel on the east side of the island varies in width. At the head I think it was about 150 to 200 feet wide, and further down toward the north probably 75 or 100 feet wide in the narrowest place. The water runs through this channel during high water season. Water stands in the channel during other seasons besides high water at the lower end, and about two-thirds the way up, I believe.

Cross-examination by Mr. HAGA:

I lived only 3½ miles to 4 from this island, lived that near all the time from 1894 to 1905. I did not live nearer than 3½ miles to this island, and part of the time I lived 3½ to 5 miles from it. During some of these years I didn't go on the island at all. And the fences I saw there when I would go on the island I don't know who put them up. The plowing that was done was done when
45 I was not there, and I don't know who did it. I don't think I ever followed the east channel the entire length of the island to observe the fences there. I was not there when the land was grubbed, so I can't say of my own knowledge who did grub it. I live in Washo Bottom now. I have lived there several years.

Redirect, Mr. BROOKE:

I saw this island for the first six or eight years, from 1894 to 1905, and I think three or four times a year each year, and after that not more than once a year. I saw grain that was raised on this island. I saw threshing done there. I don't remember the thresher man's name that threshed. He was threshing for Mr. Ramey.

Mr. Ramey raised the grain. I don't remember just what year, 1896 or '7, somewhere along there.

Q. Do you know who was known and commonly recognized as being the owner of this island in 1894 up to the time of this suit in the vicinity of this island?

Plaintiff objects as incompetent, irrelevant and immaterial. Sustained. Exception.

—. Do you know who was commonly known and recognized as being in possession of this particular island during the time from 1894 up to the commencement of this suit in the vicinity of this island?

Same objection. Ruling reserved.

A. Yes, sir.
Q. Who?
A. Mr. Ramey.

46 Defendant now offers to prove by this witness that Mr. Ramey was recognized and reputed to be the owner of this island in question in the vicinity in which this island is located during the years from 1894 to 1905.

Plaintiff objects to the offer for the reason that the same is incompetent, irrelevant and immaterial. Sustained. Exception.

Witness excused.

E. P. DOUGHERTY, called as witness for the defendant, and after being first duly sworn, testified as follows:

I reside in Payette. I have resided there five years next fall. Before that I lived on my farm about three miles east of Snake River. I am acquainted with Mr. Ramey and with the tract of land known as "Ramey Island." I have known this tract of land 15 years since I first knew it. I have known Mr. Ramey 16 years this spring.

Witness examines defendant's Exhibit "1" and states that that survey looks like a fair representation of the location of the island in question.

Mr. Ramey went into possession of this island in 1894. He went on there, I believe, and built a house; with his family. I have visited the island frequently from 1894 to 1905. The improvements on the land consist of a frame house, I guess a story and a half, and a stable and granaries the same as a farmer usually uses, and hay for his stock. And I went through the fence. That is, the gates. I always had to open gates when I went in. It seemed to be a
47 good one, all right to turn stock. It was a wire gate, and I have noticed grain on there. I have been on the place and cut willows, and I have had stock in his pasture. Specially after the crops were taken off in the fall, and then he had pastured all of his own in it that was fenced, and he took stock to pasture, and he particularly had it for pasturing stock, and also horses and cattle at different times. The last pasture he had down there was five years ago,

six years this summer. He had a wire fence around the east boundary of the island, because there wasn't water enough in this channel to turn stock, and that is where he had his gate. We crossed that little stream when we went on his island, and went up the little bluff, kind of a steep raise. There was barbed wire fencing. I never examined the fences only a little ways around where the gate was, wherever I happened to hit it.

Q. During the different times you had stock there, do you know whether that stock ever got out of there?

A. There was one horse got out, but I understand he was taken out. Mr. Moss had some horses that got in there. Whether they got in, or were turned in, I couldn't say, but he went and got his horses out and mine was with his horses that got in there. They got in there just at that time that I know of, and mine followed his out. I am used to pasturing stock. In my judgment, the manner in which this island was inclosed by Mr. Ramey was sufficient
48 to pasture stock. I visited, during this time, Mr. Ramey at his home and eat there with him and his family. Oh, it would cost probably, I am not sure whether that house was plastered or ceiled, I could not say as to that, but that would make some difference to a house of that kind; If it was plastered it would cost not less than $500. He had a granary there that was put up of lumber and he had a stable. Of course, that was a straw stable, if I remember right. This is the way I think it was put up on crotches and poles and fixed up warm there. I don't know how much land he had in cultivation. I was there when he was threshing and he had to have a machine to thresh with. It was enough to justify that. He cut wild hay as far as I know, and since that there was a little patch of alfalfa, but it has been a long time since I was on the island. According to my knowledge, he raised crops every year since he went there. I cannot say when he put all the inclosures on, but when he first went there it was on. That was about 1895, and I saw it there every year after that up to 1906, I think was the last time I was there. These other improvements that I have spoken of were there the same length of time. I said 1906, didn't I? No, it was six years ago when I saw stock on there. 1903. That was the last time I was on there that I remember.

Cross-examination, Mr. HAGA:

I can not remember the date when I visited Ramey's house and took dinner with them. I don't know what year. I was
49 there when he was threshing one day. I don't remember the year. Mr. Draper was there at the same time; I think two or three years ago. No, longer than that; four or five years; it must have been eight or nine years ago. I think that was the time I took the meal there. I didn't say that was the only time I was inside the house. I only had one meal there, though. It was a warm house and had two doors and some windows. Of course it wasn't painted. It was a frame house, shingled roof, siding on the outside. If I remember right, it was a sideboard house. I am not sure whether it

was painted or plastered. I do not know how many rooms, whether two or three, or more than two or three in it. Mr. Ramey is not living there now. The house is there still. The house, if it was plastered, to put up a house like that now, would cost $500. If Mr. Ramey says the house cost $75 he must be mistaken as to the value of the house. I was at the house—it has been quite a while since I saw the house, but when he put the house up he could get lumber pretty cheap and he probably did most of the work himself. I mean if you hire carpenters at the present time and at the present price of lumber, and if it was a plastered house, it would cost not very far from that amount. Mr. Ramey is not living on the island now. He hasn't lived there for several years. I know where he lives now. He didn't take the house off the island. It is still there. I saw it
50 the other day. I was on the island recently. It was just in the same condition, as far as I could see from the bluff. I couldn't tell you when I first put stock to pasture on the island. I don't know as I kept a memorandum of it. If I did, it could be looked up. It wasn't every year I pastured stock in Mr. Ramey's care. It was off and on. I had stock in there it must have been four or five times. The last time was six years this summer. I didn't come and get the stock. I took the stock there. I delivered them to Mr. Ramey on the island. I went on the island. We took them across that little river and took them on this island and closed the gate. I didn't go around the island to see. I put them in his care and they were there when I wanted them. I suppose he was responsible for them. He didn't give me any written guarantee. I supposed it would be safe to leave cattle with him for the reason they were always putting stock in there, and I heard no complaint from anyone using it. I was satisfied Mr. Ramey would look after them. I noticed fence around the gate when I went in. I could see a little ways on each side of the gate and it looked permanent enough. I do not know who built the fence I saw there.

Witness excused.

C. F. DRAPER, recalled as a witness for the defendant, testified as follows:

I am familiar with pasturing stock in that country where I live.

Q. State whether or not, in your judgment, the manner in
51 which the island is enclosed was sufficient to keep the stock that was pastured on the island on it, and stock outside off the island, during the years you have testified to since 1904.

A. I do. I think it was sufficient to keep stock on and off.

Q. During these years you have testified to from 1894 to 1905, who was reputed the owner of this island in the vicinity where it is located?

Plaintiff objects for the reason the same is incompetent, irrelevant and immaterial. Sustained. Exception.

Q. State, if you know, who was possessed, who was reputed to be in possession of this property during the years from 1894 to 1905?

Plaintiff objects for the same reasons just given to the former question. Ruling reserved.

A. Mr. Ramey has been known to be the owner.

Defendant offers to prove by this witness that during the years 1894 to 1905, Mr. Ramey, the defendant in this case, was reputed to be the owner of this island in the vicinity where the land is located.

Plaintiff objects to the offer for the reasons already stated. Title claim to real estate cannot be shown by reputation.

Sustained. Exception.

Cross-examination by Mr. HAGA:

Q. You stated upon your examination a little while ago that you hadn't examined the fences along this island, you didn't know how many low places there were that didn't have any fences.

52 Now how do you know that the fences that was there was sufficient to prevent stock on the outside going on the island, and stock on the island going off?

Defendant objects as incompetent and immaterial.

Overruled. Exception.

A. I never examined the fences all the way around. Some of them. I seen what fences there was was sufficient to turn stock, in my judgment. The fences I saw were sufficient. I don't know as I seen all the fence, or not. As I said, I didn't go clear around the island to see. I noticed fence in quite a number of places. Some on the south side and some on the east side. I seen some on the north side. I never examined the fence particularly on the north side. I didn't notice fence on the west side, to my recollection. I don't know whether there was fences there or not. The fence on the east side was not one continuous fence. I don't know that the fences is on all the low places.

Redirect:

Snake River bounds this island on the west. It is not usually the custom to fence around along Snake River. I have stood on the bluff and looked down on this island. I could see all the fences from the bluff. That is along the east side, I mean. Not all of them.

Witness excused.

JOHN HALL, re-called as a witness for defendant, testified as follows:

I am not familiar with the fencing and pasturing of stock in this section. I never used any pasture there.

53 Q. State, if you know, who was the reputed owner of this island in controversy from the year 1894 to 1905, in the vicinity where it is located.

Plaintiff objects for the reasons already given.

Sustained. Exception.

Defendant offers to prove by this witness that the reputed owner of the island in controversy in the vicinity in which it is located, from the year 1894 to 1905, was Mr. Ramey, the defendant.

Q. State, if you know, who was reputed to be in possession of this island during the years 1894 to 1905 in the vicinity where it is located?

Plaintiff objects for the same reason already given.
Ruling reserved.

A. Anyone speaking of the island always called it "Ramey's Island." Mr. Ramey was reputed to be in possession of the island.

Cross-examination by Mr. HAGA:

I do not think I ever heard it referred to as "Moss's Island." I never heard it referred to as "Moss's Island" prior to 1905. I could not tell you how many people I have heard call it "Ramey's Island." Anyone speaking of it would mention it as "Ramey Island." They would refer to it as the "Ramey Island" in that part of the country, in that neighborhood.

Witness excused.

A. H. RAMEY, called as a witness in his own behalf, and after being first duly sworn, testified as follows:

I am the defendant in this case. I am acquainted with
54 the island in controversy. I have known this island since 1893. I moved on the island in the spring of 1894. I lived there six years on this island. My family lived there with me. That was our home. There was no one else living there on this island during the time I lived there, outside of my family. There was no one else living on the island after I moved off prior to the commencement of this suit. I cultivated the island, about 45 acres of it, up to the time the suit was commenced. I fenced the land where necessary, grubbed the brush off. That was a period of six or eight years. I had about 45 acres in cultivation at the commencement of this suit. The crops I put in were mostly wheat, oats and barley. I sowed some alfalfa, but I couldn't only make one crop and I plowed it up. The ground that I cleared was rose bushes and willows growing up. I don't know what it would cost per acre to clear that kind of ground. I had a small house there on the place, 12 x 18, plastered. I built the house. It cost in the neighborhood of $75.00. I wouldn't say exactly. I built it myself. That would not cover all the cost of building and putting up. The raw material cost in the neighborhood of $75.00. I procured it at Emmett. That was 25 miles away. I didn't include in the cost of this lumber the expense of the trip to Emmett or the expense of putting up the house. I had fences on the east side and south side and the west end. I put up the fences there myself.

55 Q. What places along the different portions of the island were these fences with reference to the banks?

A. I started it about half way down on the east side and then run

south to the corner, and then run west most of the way across that side. The banks around this island were pretty steep; as a rule straight up and down. Ranging from 8 feet to 9 or 10 or 12. I didn't have a fence along where these banks were 8 or 10 or 12 feet high. I had fences along where the stock could go up and down and I had fences there, and where they couldn't go I didn't. On the north side there was no fence; part of the west end there was no fence, and there was no fence on part of the east side and the north end. Stock couldn't go up and down there.

Q. Were there any places where stock could get on the island where you didn't have a fence?

A. They could get off the west side across the river, or from the north side across the main channel, and get on the island. The river is about 300 feet wide there. The water is about six feet deep in low water season, the lowest place. Stock could get across there if they swam. It is not the custom for stock to swim across the river like that.

Q. State whether or not during that time from 1894 to 1905, or to the time of the commencement of this action, you had this island so enclosed by means of the condition of its banks and of the fences along the gaps there securing them as to turning stock, ordinary stock?

56 Plaintiff objects to the same as leading.
Overruled. Exception.

A. The island, at the time I went upon it, was in a native condition.

Q. Were there any fences upon the island at that time?

A. There was a hay corral on the island at that time. It was to keep small stacks of hay there and the corral had wire fence around it. The hay that was there was wild hay. It is native hay. There was some open places in there that might have been cleared and might not. It appeared to have had some willows or brush on it at some time, but whether it had been cleared or burned was more than I could tell. It had not been grubbed out any.

Q. During the time you were building the house on the island and making these improvements, did the plaintiffs, or either of them, serve any notice on you to quit this island or give up possession?

Mr. HAGA: We object as irrelevant and immaterial. I will state here plaintiff objects to the introduction of any testimony in support of the defense of estoppel for the last affirmative defense pleaded in the answer, for the reason that it does not state facts sufficient to constitute a cause of action.

Ruling reserved.

A. No, sir. Neither verbal or written.

Q. Prior to the commencement of this suit, did plaintiffs,
57 or either of them, at any time, ask you to vacate the island or give up the possession?

A. No. During this time from 1894 down to the commencement of this suit, I claimed the island as against the plaintiffs.

Q. At any time between 1894 and the commencement of this action, did plaintiffs, or either of them, at any time, farm any of this island or raise any crop on it or enter into the possession of it or attempt to?

Plaintiff objects as calling for a conclusion.

A. No, sir, they didn't attempt to enter upon it. During the years from 1894 continuously until the time of the commencement of this action, no one else occupied or farmed any portion of this island. There was no one else attempted to occupy any portion of this island between 1894 and the commencement of this action.

Q. State whether or not at any time between 1894 and the time of the commencement of this action, plaintiffs, or either of them, raised any objections to your pasturing this island or raising crops thereon.

Plaintiff objects as irrelevant and immaterial. This goes to the same question of estoppel.

Ruling reserved.

A. No, sir. At no time between 1894 and the time of the commencement of this action did I admit any claims of ownership in plaintiffs. I denied their title all that time to the premises. I have never admitted the plaintiffs or either of them to be the owners of this island.

58 Cross-examination by Mr. HAGA:

When I went on the island I found a hay stack or two there. The fence was rotted down and I cut it down to prevent stock from being cut by the wire. The stock ate up the hay: mostly wild. I didn't appropriate the hay to my own use, the stock just ate it up. The fence rotted down. I did not know whose hay it was. I made no inquiries as to whose hay it was. I didn't acquire this island from anyone. I don't claim to have acquired title to this island from anyone. I have no deed or other instrument conveying title to me when I went on there. I have no agreement with anyone about going on there. I don't know that there was an owner. I think this was a tract of land that had no owner. That is why I went on there. I didn't go on there for the purpose of securing somebody else's land. I never had any idea of taking land that belonged to anybody else. I didn't intend to deprive the plaintiffs of what was theirs at that time, or any other time. I thought it was government land that had no owner. That was why I went on it, and I still think so. I have continued to make use of it because I believed it was government land. I had no intention of appropriating to my own use what belonged to others. I moved off the island in 1900. I think in April. I built the house where I now live in the fall of 1900. I moved there in the spring of 1899. I had lived in the house, crossed during the high water in 1899. My wife thought it best to
59 move off during the high water. The fences that are on the island at this time have been built from time to time. I have not built any fence since the commencement of this action.

Only repaired there since that. That is all. They were built during different years. I have increased my herd of late years. I have had some there all the time. And those that lived or rented on the Moss place on the mainland they had cattle too. Once in a while our cattle would get mixed. They went to the mainland from the island, and vice versa. There was more or less trouble about the cattle getting commingled, about the cattle getting on the island and eating up my crops, and doing other things I objected to, and in the same manner my cattle went off the island on the other land to cause trouble sometimes. That took place during all the years. They would go through that east channel. When I went on the island there was evidence there that hay had been cut on the island, and there was open places from which hay had been cut. These places have been used since that time and some more places cleared. There was considerable wood on the island from 1894 to 1900, 1, 2 and 3. It has been cut off from time to time. There is still some at the lower end. I never talked with the plaintiffs about the island. I claimed the island as against the plaintiffs. I claimed that the island was government land. That is the only claim I ever made in regard to this island and that was it was government land. The house that I testified to is still on the island.
60 I used it of late years for a granary. I moved my other granaries on the bench. There is no public road leading on to this island. I get on the island by going down the hill and across the flat on to the island. I go across the land of the plaintiffs, through their fences. I cleared and cultivated on this island an area of about 45 acres, along about 1905. At the time I moved off in 1899 and the spring of 1900, there was just about the same in cultivation. I have increased it some since 1905. Since 1905 I have cultivated pretty near the whole island. I have increased the cultivated area since the suit was commenced.

Redirect by Mr. BROOKE:

Q. Counsel asked you some questions about the nature of your ownership. State whether or not during that time from 1894 down to the commencement of this suit, you claimed to be the owner as against plaintiffs?

A. Yes.

Q. You said something about supposing this to be government land. State whether or not, irrespective of the question, whether this was government land, you claimed this island as against plaintiffs during that time?

Plaintiff objects as leading.
Sustained.

Q. State whether or not you claimed this island as against the plaintiffs.

A. Yes, sir, and all others.

Recross-examination by Mr. HAGA:

I made a squatter's claim to this island. I claimed I had
61 squatted on government land. That was the only claim I made. I had no intention of taking land that belonged to anyone else. I went on there, squatted on it and made such use of it as I did, simply because I thought it was government land, and I still think so. I tried to file on the land. I sent an application in to Washington. I filled out an application and sent it in and they sent it back because the application wasn't right, and that was the end of it. I didn't do anything more. Yes, I believe in 1896 plaintiffs, or members of their family, attempted to file on the land as a desert entry. I contested it.

Q. What was the result of the contest?

Plaintiff objects as irrelevant.

A. I said a member of the family. I must say Ruth Moss, the wife of F. C. Moss, one of the plaintiffs in this case.

Plaintiffs object as not binding on plaintiffs. Sustained. Exception.

Mr. SMITH: We expect to put the witness on the stand and prove that. If it was made at his instigation, I believe the result of that action would bind plaintiff, but the proper way to do would have been to do that first.

Witness excused.

E. W. TRACY, called as a witness for the defendant, and after being first duly sworn, testified as follows:

62 I am deputy assessor and tax collector of Canyon County. As such, I have the custody of the records showing the assessments. I have only just at present the rolls of last year and the making of the rolls this year. The other records are in the clerk's office. They are records made in my office and delivered to the clerk after the close of the fiscal year. I have examined the assessment records in my office as to the assessments of A. H. Ramey; also, A. B. Moss and Brother, and A. B. Moss and F. C. Moss, jointly, from the years 1893 to 1904, including those records that are not of that office. I have examined those records, but they are in the Clerk's office. Those records which were prepared in the assessor's office and upon which the assessment for those years and the collection of the taxes are based. I have the data showing the result of that investigation.

Q. Referring first to the assessment of defendant, A. H. Ramey, state whether or not this island has been assessed to him for any year, '93 or '04?

A. I find no assessment again- A. H. Ramey at all. I find no island assessed. I find no island assessed to either Harry or Henry.

Q. Then you will state as a result of your investigations you didn't find an unsurveyed island lying in that locality assessed to A. H. Ramey?

A. I do not find any such assessment for any of those years.

Q. Referring now to the assessment of A. B. Moss and Brother, I will ask you the name under which their assessment was had.

63 A. This reference is A. B. Moss and brother. I do not find any assessment to A. B. Moss and F. C. Moss jointly. In regard to the assessment of A. B. Moss and Brother, it covers the years from 1893 to 1904. I have examined the assessment records prepared by the assessor for all those years included in the data possessed there by me. I have ascertained that these descriptions and figures are correct according to this assessment record.

Mr. HAGA: There is no objection to that being filed as an exhibit without taking time to read it, if the witness will say it is a summary of the assessment records made by him.

Mr. SCATTERDAY: We would like to have one more year added to the list which the assessor hasn't had time to look up.

Mr. HAGA: All right.

Mr SCATTEREDAY: I will ask you if this exhibit, Defendant's Exhibit No. 2, as shown by the records of this office, for the various pieces of land assessed to A. B. Moss and brother for the different years included in that list?

A. It does.

Q. Is the land shown in this list, Defendant's Exhibit 2, the only land which was assessed to A. B. Moss and brother for these various years from 1893 to 1905?

A. It is all I could find.

Q. I will ask you if you found from the records of these various years from 1893 to 1905 whether this island had ever been assessed to anyone?

64 A. I didn't find it assessed.

Cross-examination, Mr. HAGA:

Q. You mean by that it wasn't described separately or as an island. That it has been included in the descriptions of other land, or in the description shown in Defendant's Exhibit 2 which has been assessed, hasn't it?

A. I mean to say this island may have been assessed in some way to someone else; of course I didn't look that up. What I have looked over I do not find anything touching this island.

Q. You don't know, do you, as a matter of fact or as a matter of law that that island is not embraced in the description of Lots 1 and 2 or these other descriptions contained in Defendant's Exhibit 2. You simply say as a separate tract or a separate description of the island hasn't been assessed to anyone?

A. It has not been as far as I know.

Q. In Ramey's statement or list turned in for taxation, he hasn't noted or made any reference whatever to this island, or any improvements thereon?

A. No.

33

Redirect by Mr. SMITH:

I know from the records as regards the acreage contained in the lots described on this statement.

Q. And the acreage described from the government records is the amount of acreage which has been assessed to A. B. Moss and brother?

A. I would have to compare that because the acreage varies there.

65 Q. But the variation is very slight as compared with this? Not more than an acre or two's difference from one year to the other? About four acres difference?

A. There was three or four acres, something like that; it was 193 acres; now it is 197.27 acres. It simply covers the number of the lots and acres. It doesn't show in the amount of acres in the government survey. I expect it does not in some instances and I expect it is given in otherwise at various times because it varies, and the government survey would not vary. I have examined the government survey, but not enough to say much about it.

Witness excused.

J. S. MILLIKIN, re-called as a witness for the defendant, testified as follows:

Q. Examine the map, Defendant's Exhibit "1," and state how many acres of land is in the island.

A. I didn't figure the number of acres. I surveyed it, but according to the schedule or my map, I made it correct. There is 120 acres.

Q. In this map, you may explain what line that is running from the center of Section 27, or in a northerly direction to the north line of Section 27 as you found from the examination of the government records and which you have drawn on this map introduced in evidence.

A. It is called a meander line.

Q. What is the approximate area, if you can tell, between that meander line and the east line of the east channel.

66 A. I couldn't tell you exactly, but the map is drawn to a schedule, and I think from the scale as I see it on this map that there is about thirty acres between the east channel; thirty acres to forty acres. It may be thirty, somewhere in there, but I am taking from the scale of the map.

Mr. HAGA:

I didn't measure the island when I did that surveying. I meandered it. I didn't run lines across to see how far across, but I drew the map to a scale. I measured the channels in several places. I am prepared to say that accurately represents the width of the ground taken up by the channel, very nearly. I laid this map off with my rule. I am not prepared to say positively the amount of acreage in the island and between the meander line and the other river. I didn't measure it for that purpose. I was there to determine

the shape of this island and where it run in relation to these lines, and approximately where it was, whether in Section 27 or 28, and to know the elevation above the mean water line in the river in high water or low water. I drew the map according to these notes; that could be approximated within a very small fraction by taking the scale, but it would take quite a little work to triangulate that. I would have to get all these angles and connect them into triangles. When I have all these points it can be shown by the figures because I know what each one of these lines represents.

Witness excused.

67 A. H. RAMEY, re-called as witness for defendant, testified as follows:

I was present at the contest case on this land, when it was attempted to be filed on as a desert entry by one Ruth Moss in 1895 or 1896, I don't just remember. F. C. Moss was one of the witnesses for Mrs. Ruth Moss. Mr. Moss was a witness in that case, testified in the case. I do not know who called Mr. Moss as a witness. I was present at the contest.

Witness excused.

F. C. Moss, called as a witness for the defendant, and after being first duly sworn, testified as follows:

I reside at present at Wendell. Formerly, in Payette. I am the husband of Ruth Moss. I remember the time of the contest involving the land in question in the Land Office in Boise. I was present at the contest. I testified in that case. I was not interested in it. I didn't instigate the original entry. She made that entry on her own motion, without any suggestion on my part. We may have talked it over.

Witness excused.

Mrs. LILLIE D. REDDINGTON, called as a witness for the defendant, and after being first duly sworn, testified as follows:

I live, and have lived, in and near Payette 23 years. I am living in Payette now. I lived a year and a half on the ranch. I am acquainted with Mr. Ramey. I am acquainted with what is
68 known as Ramey Island, in Snake River. I first saw it in the spring of 1893. My homestead was located southeast of the island. My northwest corner was on the bank of the dividing slough between it and the island. I never measured the distance between. Mr. Ramey moved on the island in 1894. There was no one living on the island then. There were no buildings on it. No improvements of any kind, but hay stacked. Mr. Ramey moved on the island with his family. I visited the island in 1894.

Q. How often did you visit the island from '94 on, and when did you cease to visit it?

A. Sometimes one summer every day. Sometimes not oftener than once a month, or more, until 1899 when I went east. In the

summer of 1899 I ran my cows on Ramey Island, and every day I rowed a boat across the slough to milk these cows. Hunt them up and drive them down by the fence, then put my milk into the boat and rowed back across the channel to take my milk home. I did that all that summer. There was water all that season in the channels. I had to row a boat all summer and in the fall as long as I had the cows there.

Q. Describe the boundaries of that island as you observed them as to the banks and enclosures.

A. Along the southeast boundary is steep banks except where Mr. Ramey drove on and here he was obliged to level it. It made it very steep to drive up. On the east side it was low and shallow and willows grew along the sand bars and wherever it was
69 low and cattle might come on and off, he built a fence. The west end had a fence; on the northwest side of the main channel facing Ontario, there was no fence because of the width of the channel and the depth that cattle might not cross; on these places they were not steep enough to prevent cattle from crossing he had a fence. There was fences on the west side of the island, also. As regards improvements, in the spring of 1894 he built a small house 12 x 18, containing two doors and two windows. Later he built a granary for the grain. He cut off the willows and wild roses where they interfered with free cutting of hay, thereby cutting a little more each year until he had nearly cleared the center of the island. Whenever there was high water he raised hay and grain, and whenever the water was low the crops would fail. We could not say that he raised anything. I could not say how many acres he had cleared in 1899, and in a condition to put in crops. He built a shed on the house. A small shed on the back, and planted shade trees and built a dooryard to keep the babies from straying to the river, and he had a chicken yard, a small house for chickens. The fence was part of it barbed wire and he put boards on the bottom to keep his hogs fenced. Part of it was woven wire, consisting of two barbed wires which he twisted himself, and put in willows for pickets, making a picket fence of woven barbed wire and willows. No one ever cultivated any part of the island or raised crops
70 on it after Mr. Ramey moved on. His family were there during these years, and his family were present there during the time I was acquainted with the island.

Cross-examination by Mr. HAGA:

I could not see the island from the residence I then had. I could see it from my present residence. I would have to go 50 or 60 rods, 40 or 50, somewhere along there before I could look over on the island. I had my cows pasturing on the island in 1895. I put them on in the spring, but they were there all summer, during the months of July and August, anyway, and I think longer. Yes, in June. I was there during high water, during June, I think they went before the high water. I done milking on the island the whole summer myself. In going to and from the island I went down the hill on the northwest corner, down across—took a boat in the slough and

went around the east end of the little island up the channel between the little island and the big island and landed on the big island. I had to cross Moss's land to get there. A little corner of his land, just a little corner. There was no public road there except a trail that ran up and down on his side of the fence. There was no public road leading to the island at that time. I am not sure whether I used the island in 1896 or 1897 to pasture my cattle there. I didn't do my milking there, anyhow. After this year I have spoken of when I didn't do my milking there I didn't go as frequently after
that. May be once a week or once a month during the years
71 following, I did go there sometimes to visit. I would go to
the house and help them in sickness. I often crossed by boat. I go the same way, down the channel a ways and go up the little channel is the way I usually did. There was a ford where the water was shallow. That was where Mr. Ramey and others usually crossed. There has been cattle on the island most of the time during the years testified to. That is what the land around there is used for mostly. Cattle oftentimes from the island would go down and when the water was lower would wade through until they got to the fence and stand in the shade of the willows. They didn't always go on the island. And they didn't when the fence was there anyway. Not very frequently. They went on the island when they broke the fences down or someone broke the fence. They sometimes went around the fence when the water was low until the fence was repaired. I think the fence was continuous from the west side around there and the wire fence was continuous at the high places to keep the hogs in. There was boards at the bottom to keep the hogs from going over the banks. I do not know of my own knowledge whose hay was on the island when Mr. Ramey went on there. I only knew by hearsay who put it up. Mr. Cyrus Williams, I think, was there the year before. They just moved off. I don't know that he was the one who put the hay up, or had it put up. It was all put up before I moved out there. Mr. Ramsey attempted to irrigate the island at
times. It was irrigated from the high water. He had no
72 irrigation ditches on the island. He put in a pump and one
season would pump some water; just one season. The high water didn't come up high enough last season and it failed, so he got a pump. During high water he raised some crops, and then from lack of water the crops failed. Mr. Ramey always cut a hay crop there, whether the season was a dry one or a wet one.

Witness excused.

Defendant rests.

Plaintiffs' Rebuttal Testimony.

CYRUS WILLIAMS, called as a witness for plaintiff in rebuttal, and being first duly sworn, testified as follows:

I live about six miles southeast of Payette. I have lived in a cattle country over twenty years. I have been familiar with the island

involved in this controversy 19 or 20 years. I owned it at one time. I sold it to the plaintiffs in this case. I didn't make a deed to this island. I did not live *on* the island. I lived on the land adjoining it on the main land. I fed stock there some one winter and my family lived there part of one summer. If I remember correctly, it was 1891. I pastured stock on the island and I didn't cut any hay on it. I sold it to Mr. Moss before the hay was cut. I pastured it that spring, until I sold it to Mr. Moss. I could not say how frequently I saw the island between 1894 and 1905, but as far as the place goes, I don't suppose there has been a year I haven't
73 seen it, during some years I have not been on the place. Some years I saw it several times.

Q. Had plaintiffs made any use of the island from 1894 to 1905?

Defendant objects as leading. Overruled. Exception.

A. Well, there was a number of years he has.

Q. What has the island been used for?

A. Well, at one time when I was by there I saw—I was going to say a grain crop, but I saw the stubble at that time and some straw. I have seen fences on the island. At this particular time that I was there, there was part of a fence on the south end of the island, that is, running out across, and as well as I remember there was two wires, but I don't think I got off my horse to go on. I just went around it and went on the island. I looked through the stock and found one of mine and I took it out on the lower part of the island. It would be following the middle road right through the fence there. There was no fence at that time to prevent stock from going on the island. I didn't mean to say there wasn't any fence, but there wasn't none there that would prevent stock going and coming. The fences were in a bad condition and stock were going right through it and over it. I seen different irons there. I was looking for my cattle. I don't know how they got there. Just strayed on, I suppose. I didn't rent pasture there from Mr. Ramey. I took them off without breaking the fences or going through the gate. The
74 fences were not what I would call fences that would protect the man's crop without some other protection aside from that. In the low places in the bank were little fences put up to keep stock from going back and forth, but while the grass was good on the island they would protect it; they would protect it from going off. The fences were what I would call poor fences. All along the sloughs they were built with willow posts and wire. As well as I remember in places 2 and places 3 that I noticed. The posts were not close together. The wires were not well stretched. If stock were well fed the fences would turn cattle. If they weren't, they wouldn't. These fences would not prevent stock from going on to the mainland from the island. I am familiar with the fences used in that part of the state in that vicinity. I have been in the cattle business for twenty years.

Q. Are these such fences as are used by people in that community?

Defendant objects that it is incompetent, irrelevant and immaterial, and calling for a conclusion. Overruled. Exception.

A. People in that community do not use very good fences because they have got a kind of a herd law there are miles of fences in that community which would not turn stock. Take the country through there, if that is any criterion to go by, and I don't believe there is a lawful fence in that part of the country anywhere.

Q. Are there such inclosures that would prevent stock—as would protect the island from stock?

75 A. No, not. There is outside fences on Mr. Moss's outside of the lands that is pretty good fence.

Q. These are on the mainland?

A. Yes, and that prevents stock going on the island. And then there is a fence right on the main land on the west side of the mainland that was there 20 years, good enough that kept stock from going on the island: the fence on the island would not prevent them from going on or off if it were not for the outside fence.

Cross-examination, Mr. SMITH:

I would hate to tell just the year I saw the grain crop. It was between 1894 and 1899. As I said, I saw the stubble there and a straw stack, so I know there was grain raised there. I saw other improvements on the island. I saw a house there. I saw somebody living in it. That was not the only year I have been on the island. I have been there different times, but not very frequently. As I say, as business called me; I was running cattle. I was running cattle in Oregon, and would be up on that side of the river pretty near every year, and there was two or three times I pastured cattle on this side. I was up and back and would frequently ride up on the bank and look over simply for curiosity.

Redirect, Mr. HAGA:

Q. What was on the island in the way of improvements before 1894?

Defendant objects as incompetent, irrelevant and immaterial, and not proper rebuttal.

76 Mr. HAGA: This is only to show what is there in the way of improvements now not placed there by the defendant.

Overruled. Exception.

A. There was hay corrals there, and there had been land cleared, quite a bit of land cleared in places.

Q. Do you know whether it had been cultivated to crops for any purpose?

A. Well, the hay crop where it had been cleaned off. The best hay grew in the low places where there were heavy willows. I think at the time I bought it I paid for eighty odd tons of hay that had been cut on the island that year.

Witness excused.

J. L. HENSHAW, called as a witness for plaintiff in rebuttal, and after being first duly sworn testified as follows:

I have lived in Canyon County 29 years. I have known the land in controversy 27 or '8 years. I reside in Payette now. I have not been on this land very often between 1894 and 1905. I didn't notice the fences particularly around this island. There were fences there where the banks were low. There were fences run up where the banks were steep; I couldn't say how many wires. The posts looked to be quite a ways apart. I think the summer they built the fish hatchery I had contracts for work and I camped right across from the island on the main land on the Oregon side. I had contracted to
77 haul lumber and when the lumber wasn't in shape so it could be hauled, I worked on the fish hatchery tracks and I was on the upper end of the island a number of times during that summer.

Q. You may state whether or not the fence you saw and the enclosures maintained around the island were such as would keep cattle from going from the island on the mainland, or vice versa?

A. I couldn't say. That summer I was camped there some one drove cattle down the bluff to the mainland and in the evening he would go down on the island and drive the cattle back. I wasn't on the east side of the island to know what the fences were, but they would drive the cattle down the hill on the mainland and in the evening I would see them taking them up, driving them back. There has been some grain there on the island and pasture and hay. There was some wood cut off it.

Cross-examination, Mr. BROOKE:

I was camped there in 1903. I went there the 1st of July, and left September 1st. I was there two months. These cattle might have been driven through the gate. I wasn't over there to see.

Mr. HAGA:

I saw the island, however, before 1903 and after 1904 at different times. I was in sight of the island several times, but not on it. I could not say whether cattle would be crossing back and forth from the mainland to the island, or whether the fence was such as to prevent them. I wasn't close enough to see. I remember seeing cattle on the island, and on the bluff. I don't know
78 whether they were separate or not. I couldn't get close enough to see. Prior to 1905 they cut hay there. I seen hay stacked on the island. And I know of them hauling wood off the island and hauling it to Payette and selling it. I don't remember what date; I remember they hauled wood and sold it. It was done during the '90's. I could not say whether after or before 1904.

Mr. SMITH:

Kizers hauled wood down and I think Frank Moss hauled some. I don't know of anybody else.

Witness excused.

E. D. GLADISH, called as a witness for the plaintiff in rebuttal, and after being duly sworn, testified as follows:

Direct examination, Mr. HAGA:

I have lived six miles south of Payette since 1900. I have known the island in controversy since 1901 and have seen it before that. I came there in the winter. That is the first I knew about it. I know the mainland adjoining the island.

Q. I will ask you if you had any arrangements with plaintiffs in regard to the use of the island and mainland between 1894 and 1905?

Defendant objects as immaterial, incompetent and irrelevant.

Mr. HAGA: I want to show how plaintiffs made use of the island and the mainland.

Objection overruled. Exception.

79 A. I rented the island from Mr. Moss. The first year I rented the Moss land this pasture extended about a mile and a half and I rented the whole piece. This was in 1901. I came to this country in 1900. I rented this pasture and I had milk cows in there and also some of my neighbors wanted to put in a few cattle and I took them. I am talking about Mr. Moss's land, the whole land. He said the island was in it. He said he owned the island. I was taking in other cattle of my neighbors and put them in the pasture; usually in the spring they didn't get over. The water was up. We would turn them down there later. They got to going over on the island as the water went down. I rented all the first year, 1901. The next year I rented what was known as—what Mr. Moss described as the Clement tract, leaving off the lower end of the pasture. There was a kind of a division fence between the two. There was some fence on the island on the south end and on down there was some picket fence, I believe; the other was a wire fence. There was three wires, in places. Still the stock mixed and went over across. It wasn't of a character to keep stock from going back and forth. The cattle outside were really fenced off by this Moss fence that circled the whole bottom clear to the lower end. Some time the fence got knocked down and the Whitely cattle got in. But as to the cattle I had in there, they went on the island, and the cattle Mr. Ramey had in there would mix, they would go from on the mainland over on that land over to the other pasture.

80 Cross-examination by Mr. BROOKE:

When I rented this land I rented the mainland and he said the island was a part of it. "Go ahead and pasture it," is what he said.

Defendant moves to strike out as not responsive.

Overruled. Exception.

I never cultivated any part of this island. I never cut hay there. I never attempted to raise crops over there. I didn't put any cattle over there. They would go over. The first year I rented they would go over. It was mainly milk cows and I had to get them out.

They would cross the slough and get on to the second little flat. Some nights I had to leave them. I couldn't find them, so I got Mr. Moss to furnish a little wire and I tried to keep them off the island. Mr. Ramey had a fence on the island, some fence on there, some wire fence and picket fence. The banks in some places were high. The fence extended around from the southwest corner around on the rise and on down to this piece spoken of on the east side. The fence was placed where the cattle was most likely to be. It was apparently placed there to keep the cattle out. He aimed to keep them off. He said he claimed the island. Te said he owned the island. It was a disadvantage to me to make any attempt to use the island. I would have trouble to get the milk cows off. When the water was high they didn't bother. When it got low they began to bother. If they got in, they would go quite frequent, it
81 depended on how the pasture was on the other side. The pasture in the spring on the mainland was fairly good; in the fall and late summer it wasn't so good. The cattle broke in in the fall, mainly August and September, when the pasture wasn't good. The pasture is not so good then and the water is down. The pasture was poor on the mainland at times. In the fall it would get eat up and then they would go back. My stock weren't so breachy as some that went there. They weren't so bad as the others. They got to going in the spring. Some of the stock were so breachy that they would go through any of the fence. They would break through most any of the fence.

Redirect examination by Mr. HAGA:

The cattle on the island came over on the mainland. They crossed back and forth some. The second year I found how much trouble it was getting those milk cows up at night, going down through the willows. Sometimes I couldn't find them and I left them on the island, and the next year I went to Mr. Moss and asked for enclosures; wire to fence off the island; it was detrimental to me. I put up the fence. Mr. Moss furnished the wire and I done the work. That was to prevent cattle from the mainland going on the island; that was what it was built for. It didn't do it altogether. Well, I kept them off pretty good with the fence except this bank, it would get low and they got to coming down that.

Witness excused.

82 ED MOSS, called as a witness for plaintiff in rebuttal, and being first duly sworn, testified as follows:

I live in Weiser. I am familiar with the island in controversy. Have known it 14 or 15 years. Beginning with 1894 I visited the island frequently. I was in charge of the land, the mainland and island. It was used as a stock pasture by A. B. Moss and brother. My duty was principally to look after the stock that was pastured there by different parties and also the fences; keep up repairs, generally. That took me over on the island quite frequently each year. It was used as a pasture in connection with the mainland, after

1894 I might say that some of the years after that it was used; the land was cultivated by pasture. I do not remember how many years after 1894 to 1895 when it wasn't used by plaintiffs for pasture purposes. It was used for pasture purposes during those years nearly as much as the mainland was. I have taken stock over there. I took it off. Stock was pastured there belonging to plaintiffs and other parties. I was in charge of that stock. I was paid by plaintiffs to work for them. I put the stock in there that was taken to pasture. In putting stock in for pasture it was taken over on the island and also left on the mainland. The fences around the island after 1894 were woven wire fences, you might call it; homemade fences with wire woven and small willows about four feet long; other
83 places they were stretched from larger willows to posts and from posts to willows. As a general thing the fences were very poor. The fence principally was put in the gaps in the bank around the lower places around the island for the purpose of keeping stock off or on, just as it might be. But it didn't do it. I know as a matter of fact that stock come back and forth from the mainland to the island, and from the island to the mainland. I put stock on the mainland and I found it on the island. And stock I would see on the island at one time, the next time I would see on the mainland. I drove them across around the fences and over the fences. I could do that without going through the gates. The fences being put around the island were not of such a character as to protect the island from stock on the outside, or on the land opposite from the stock that would be on the island. I don't remember any other purpose the plaintiffs used the island for. I couldn't positively say they cut wood on it. I did, myself. I cut some wood. I had permission from plaintiffs to do that. I took it home. I don't remember as anyone assisted me. Roy Cram and I worked there one time at cutting wood in 1900. We cut there. Had permission from the plaintiffs. I don't know how much we cut at that time, more than one lot, and hauled it off and sold it. There was no public road to this island. There is no public road leading to the island. They get on the island from the mainland by crossing
84 two or three places at the east channel or slough, or whatever you might call it; to go across with a wagon, on foot, or horseback, or most any way you want to cross, it is necessary to cross private land in order to get on the island after leaving the main road. It is necessary to cross after leaving the main road. It is necessary to cross A. B. Moss and brother, the main land.

Cross-examination, Mr. BROOKE:

I think Mr. Ramey was living on the island a period of time from 1894. I wouldn't say all the time up to the present. I would not be positive when he did go on there. I think it was about 1894. I could not say positively whether he lived there or not. Sometime during the year he lived there—he may have all the time. I seen his family there. He lived there until about 1899 or 1900, somewhere along there. Cultivated crops on there, I believe. I couldn't say that he cut hay on it. I didn't see him cut hay. I was on the

island quite often up to 1906, and 1907. I don't remember what year I first went there. I cut this wood on the little island in the channel and on the mainland. We did drag some wood from the eastern bank of the main island to the mainland, but very little. That is all I got from the island. Mr. Ramey didn't say anything to me about cutting wood on the small island. I didn't cultivate any of this island, myself, or Mr. Moss. I never cut any hay on it. I don't know whether Mr. Moss did or not. I was foreman there.

85 I wasn't there continuously twenty-four hours every day. I couldn't say what was done all the time. Most likely I would have known if any hay was cut there. I run cattle there on the island. I took them over there. I don't know how many times; more than once, though. Sometimes I would drive them to the east channel and let them go on. Sometimes drive them over on the island. I didn't break fences to go on the island.

Redirect examination, Mr. HAGA:

As near as I can remember, it was about the fall of 1893 or '94 when I commenced to pasture cattle on the island. I couldn't say how many years I continued, four or five years, I can't remember the last year I had anything to do with the pasturing of cattle there. I could not say whether it was used every year or not to pasture cattle. The time I was there it was used more or less to pasture cattle. The lower part of the island is thickly wooded with lots of willows and brush, more than the upper part of it considerably. I do not know who has cut wood on the island since 1894, outside of what Mr. Cram and I cut. I was foreman for Moss & Co. only for pasturing of the cattle on this ranch. I didn't have anything to do with it. I just looked after pasturing the cattle.

Witness excused.

F. C. Moss, recalled as a witness for plaintiff *on* rebuttal, testified as follows:

Direct examination, Mr. HAGA:

I am one of the plaintiffs in this case. I have known the island in controversy 20 years. I knew it before we purchased it.

86 Nothing but hay had been raised there before that. The only hay that was raised there just grew naturally. There was probably 30 or 40 acres of hay land. Hay had been cut on it the year before we bought it. I don't know how much. There were two little stacks there. 20 or 30 tons. My brother and I have used the island for pasturing and cutting hay and cuting wood and pasturing. I don't know what years between 1894 and 1905 this island was used for pasturing purposes. I think every year. Some years it had stock there; some years cattle; other years horses and cattle and some years only cattle. During the years I referred to my brother and I owned the mainland adjoining extending about a mile and a quarter along the river. I have resided about four miles from this land in Payette. Sometimes I went to the land

every day; sometimes once a week or once a month. I kept stock there and rented some of the pasture. My pasture was about 2½ miles long; it included the island. It was all used for pasture. I cut hay there two years myself. The stock I have referred to, I turned them thru the fence and let them go. The fence was around the mainland; my own fence. They went on the island. I got them off there lots of times myself, found them on the island. They could just walk across. The only fence on that island was my fence around the hay corral, and that was torn down and taken away, the only fence I saw there. That was in 1894. Along the east channel a wire was stretched in some places, some places
87 none. There were no posts there. The wires were fastened on willows and stuff along the bank. These enclosures were not sufficient to keep the stock from the mainland from crossing on the island, or the stock on the island going over to the mainland. The island was also used for wood. The wood was taken off at the north end. I just don't remember the years the wood was cut. As we wanted it we went and cut it. After 1894 and before. Since we bought, every year as we wanted it we cut some wood, and posts, too, to fence our land. We cut it off the island. I rented the entire ranch, including the island, one year to Mr. Kizer; that and the outside to Mr. Kizer. I rented the entire ranch to Mr. Kizer and he cut hay there on the island. That was in 1893. I think, if I am not mistaken, it was in 1894, 1893 and 1894 we sold hay to Mr. Harris there, and he fed his sheep. They plowed part of the outside place. I do not remember when the house was built. There was one there. A little shack. I saw Mrs. Ramey on the island. I talked with her. I don't remember that any hay was cut on this island by me or anyone else. After 1894, I am not sure, I know we cut each year there if the crop was worth cutting. Some years it wasn't worth cutting. Some years it was drowned out. There was no public road leading to this island. They go through our land on the bottom, the Ross Clement place, as we call it. My brother and I have title to it. They have to go over our land and through the fences, through one fence, I believe.

88 Witness excused.

ROY CRAM, called as a witness for plaintiff in rebuttal, and after being duly sworn, testified as follows:

I live in Payette; am familiar with the land in controversy. Have known it since 1900. I was cutting wood there in 1900. Mr. Moss gave us authority. We were hauling it to Payette and selling it. We were there parts of several months in the fall of the year. We cut several loads. I noticed some pieces of fence. There was fences around part of it. The wires was fastened to willows. There was places where the fence was down while we were there. It was not such a fence as would keep stock from going on the mainland, or from the island, or vice versa. Stock was going back and forth at that time. There was cattle coming across from the island and getting into our camp and destroying quite a bit of stuff there.

Cross-examination:

We cut some wood on the mainland and some on the island. We cut some on the large island. We cut some willows there and hauled them off. Mr. Ramey objected to our cutting. We didn't cut any after he objected on the mainland. I am 28 years old. That was in 1900. Mr. Ramey wasn't living on the island at that time.

Witness excused.

A. B. Moss, recalled as a witness for plaintiff in rebuttal, testified as follows:

89 I used this land in controversy since 1904 as a stock pasture almost entirely and rented it as such since 1900; the land and island, the land adjoining, part of it to one man and part of it to another for summer and winter. Prior to 1900 the island was used by F. C. Moss for his cattle and horses for pasturing, and for cutting wood. Of course I had some of the wood that was cut there, bought it and paid for it, some of it from the island. Cattle would cross from the mainland to the island, notwithstanding the fences and enclosures. Practically every year this would be true since I have known the place. I know of efforts being made by me and those representing me to erect enclosures there, and it would segregate the mainland from the island for pasturage purposes. I rented the island and the mainland adjoining it to E. B. Gladish in 1900, I think was the first year, and every year since that to him down to 1901 or 1902. Gladish asked me for wire to build a fence with between the mainland and the island. I furnished the wire. Fences was put up there to keep cattle off the island.

Defendant moves to strike out as immaterial and not proper rebuttal.

COURT: This all goes to the exercise or non-exercise of dominion over the island by the plaintiffs.

Mr. HAGA: And the character of enclosures.

Mr. SMITH: This refers to a fence on the mainland. We are willing to admit a fence built there, but don't care to get
90 into the record anything he doesn't know of his own knowledge.

Mr. HAGA: State whether the enclosures around the island in 1894 and 1905 were such as to keep stock on the mainland from walking on.

I know that stock crossed over. In 1905 I gave a man verbal permission to camp there on the island with his horses for prospecting, and mining. It was in 1905. His wife and one little child. He traded with me during that winter. I sold him a wagon and he mined all up and down the river. I didn't see him there. I gave another man permission to mine a couple of months around the island. He is the E. G. Jeffries who testified as a witness on behalf of the plaintiffs in the former trial of this case. He is now dead. I don't know of my own knowledge whether Mr. Ramey ever spent a day on the island; I never saw him there. While

I heard there was a house there I never saw it. I never had a conversation or talk with him (Ramey) in any manner, never spoke to him about it I never saw him on the island. I didn't cut any wood on the island myself. Haven't cut any wood in a good many years. The place was looked after by Frank Moss. During the 90's, his son, Ed Moss, looked after it before him. When we purchased it, there was about forty acres we cut hay on when it was high water, nearly 80 tons of hay the year we bought it. There were bunches of willows, these bunches have been taken out, but it was
91 practically cleared. We hired some of the grubbing done by Kizer, but I think possibly that was in 1894, or it might have been 1893. Since that there has been some clearing done. I would judge whatever the willows stood on, possibly 20 acres, it is hard to tell unless you measured it. There has been some clearing done. Quite a little. The land adjoining it is rented at present.

Cross-examination by Mr. SMITH:

I have seen all that I testified to. I was there last Sunday morning with a witness in this room and we could not see it. It was probably there but I could not see it. The house is over in a bunch of cottonwood trees but I couldn't see it. I have been on the island about twice since 1894 to 1905. About the wood that was cut there, I don't know of my own knowledge. I never saw any wood cut there. There has been some clearing and I don't know who cleared it, if it has been cleared. I have been largely interested in business in other ways.

GILBERT SHELBY, called as a witness for the plaintiff, and after being duly sworn, testified as follows:

Direct examination by Mr. HAGA:

I was court stenographer in March, 1906, of this court, and reported the testimony taken at the trial of said case during that term of court. One E. G. Jeffreys testified for plaintiffs in that case on rebuttal, page 92 of the transcript is the testimony of Mr. Jeffreys.

Plaintiffs offer in evidence testimony of E. G. Jeffreys,
92 or that portion of the page as shown by Exhibit No. 6, both direct and cross examination.

Defendant objects for the reason the same is incompetent, irrelevant and immaterial, and that the proper foundation has not been laid, and for the reason there is no authority in the statute authorizing the testimony of a deceased person to be read into the evidence of a case of this nature.

Ruling reserved. Witness excused. Plaintiffs rest.

A. H. RAMEY, re-called as a witness in sur-rebuttal by defendant, testified as follows:

The facts in regard to the stock going on the island from 1894 to 1905 are as follows:

Part of the stock that went on the island from the outside had

boards over their faces and some had sticks around their necks, and the fences were not sufficient to turn that class of stock. I found stock on the place. I drove them off and fixed up the fences. These appearances were not frequent as regards the stock of plaintiff. There was no wood cut on the island from 1894 on, only by myself. There was no wood or posts hauled from the island. I was there in 1900 when Mr. Cram testified to having cut willows there, he and a son of Mr. Moss. I don't remember seeing him cut any wood or saw him any place where there was any wood. I made objections to Mr. Cram cutting wood on the little island between the main shore and the big island. They quit after that. Mr. Cram didn't cut any wood on the main island.

93 Cross-examination, Mr. HAGA:

I haven't been on the island or lived on it for about nine years. I didn't notice any wood cut on the island. I saw no places where there had been any cutting, except what I cut, myself. I don't know as I recollect now how my cattle got to going off the island. They broke out only occasionally.

(Title of Court and Cause.)

Notice of Intention to Move for New Trial.

To A. B. Moss and Brother, a Co-partnership, Consisting of A. B. Moss and Frank C. Moss, Plaintiffs, and to Messrs. Richards & Haga, Plaintiffs' Attorneys:

You, and each of you, will please take notice that the defendant, A. H. Ramey, intends to, and will, move the above entitled Court to vacate and set aside the decision, judgment and decree heretofore rendered and entered herein, and to grant a new trial of said cause, upon the following grounds, to-wit:

1. Accident or surprise, which ordinary prudence could not have guarded against.

2. Newly discovered evidence material to the defendant which could not with reasonable diligence have been discovered and produced at the trial.

3. Insufficiency of the evidence to justify the decision of the court.

4. That the decision of the court is against law.

94 5. Errors in law occurring at the trial and excepted to by the defendant.

6. That this court did not have jurisdiction in the premises.

Said motion will be made upon the affidavits hereafter to be filed and served upon you; on the records and files in the action; upon the minutes of the court; upon a bill of exceptions and statement of the case hereafter to be prepared; or, said motion will be made on any, other, or all of said showings, i. e., affidavits to be filed and served, records and files in the action, minutes of the court, a bill of exceptions, and statement of the case hereafter to be prepared.

BROOKE & TOMLINSON,
SMITH & SCATTERDAY,
Attorneys for Defendant.

Due and legal service of the above and foregoing notice and receipt of a copy thereof, admitted this 10th day of May, 1911.

RICHARDS & HAGA,
Attorneys for Plaintiff.

Filed May 10, 1911.

Specifications of Error.

Defendant assigns and specifies the following grounds and particulars of error upon his motion for a new trial herein:

Insufficiency of evidence to justify the findings, decision and judgment of the court in the following particulars, to-wit:

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1.

That the evidence is insufficient to justify decision or finding No. 2 of the court, that "on the — day of ——, 1899, the Government of the United States issued to the said Roswell P. Clement a patent covering" Lots 1 and 2 of Section 28, and Lot 1 of Section 33, Township 8, N. R. 5, W. B. M., "and that portion of said lots included in the tract of land particularly described in finding No. 6."

2.

That the evidence is insufficient to justify decision or finding No. 3 of the court that the said Roswell P. Clement conveyed to plaintiff the legal title to the tract of land involved in this action and particularly described in Finding No. 6.

3.

That the evidence is insufficient to justify decision or finding No. 4 of the court, "that on the first day of April, 1892, the United States Government issued to said Frank Heron a patent covering" Lots 1 and 2 of Section 27, and Lots 3 and 4 of Seciton 22, Township 8, N. R. 5, W. B. M., "and that portion of said lots included in the tract of land particularly described in Finding No. 6"; and is insufficient to justify finding No. 5 that said Frank Heron conveyed to plaintiff the tract of land involved in this action and particularly described in finding No. 6.

4.

That the evidence is insufficient to justify decision or finding No. 6 of the court, "that the said lots and premises above described
96 lie along and border on the right bank of the main channel of Snake River and extend westerly to the center of the main channel of said river, and the following described tract is a part of the premises above described and was conveyed to plaintiff by the said grantors, towit: that certain tract described in paragraph VI of the Complaint herein, and which extends from a point near the south boundary line of Lot 2 of Section 28, northerly to a point near the north boundary line of Lot 1 of said Section 27, and westerly

from the Government meander line on said Lots 1 and 2 of said Section 28, to the center of the main channel of Snake River," and shows affirmatively that said tract of land last above described is no part of, and was not included in, the patents for said lots.

6.

That the evidence is insufficient to justify decision or finding No. 8 of the court, "that the said defendant never occupied the said premises or any part thereof, under a claim of title exclusive of any other right, or otherwise, and he never occupied any part of said premises, or claimed possession thereof under a claim of title, or upon any other ground than that he believed a portion thereof to be part of the unsurveyed public domain. And said defendant at no time had any intention of acquiring title to any land of plaintiffs herein, and said defendant made no effort, and took no steps, whatsoever, to acquire title to that portion of said premises which he occupied
97 for a time under the erroneous belief that it was part of the unsurveyed public domain."

7.

That the evidence is insufficient to justify the decision or finding No. 9 of the court, "that the said defendant has not, for as long as five years at a time, or for any period more than a few months or a year without interruption, had continuous, actual, open, adverse, notorious or exclusive possession of any part of the lands herein described, or referred to in defendant's answer, under a claim of title, or otherwise," and affirmatively shows that defendant has at all times since the year 1894, had continuous, actual, open, adverse, notorious and exclusive possession of said premises and has held the same under a claim of ownership against plaintiffs, and their, and each of their predecessors in interest, continuously and against any and all persons whatsoever since the said year 1894.

8.

That the evidence is insufficient to justify the decision or finding No. 10 of the court, "that the said defendant did not protect any of the premises herein described, or that portion thereof described in paragraph VI hereof, with substantial enclosures, nor did he have exclusive or adverse possession thereof, or any part thereof, continuously for five years immediately preceding the commencement of this action, or for any other period of five years. And the said defendant has not paid any of the taxes levied or assessed against the said premises," but the evidence does show that defendant has,
98 during all of said time, since the year 1893, had said premises enclosed by good and substantial enclosures, and has cultivated the same during each and every year, and harvested hay, grain and other crops therefrom during each of said years, and has during all of said time had exclusive and adverse possession thereof,

and that defendant has during all of the said time paid all the taxes which were levied or assessed against the said premises.

9.

That the evidence is insufficient to justify the decision or finding No. 11 of the court, "that during the five years immediately preceding the commencement of this action and ever since the said premises were acquired by plaintiffs from their grantors as hereinbefore stated, the said plaintiffs have used the premises herein described, and the whole thereof, for pasturing stock and for grazing and other purposes," but shows that since 1894 the said premises have been in the exclusive possession of defendant.

10.

That the evidence is insufficient to justify the decision or finding No. 12 of the court "that the said plaintiffs, nor their predecessors in interest, have at no time abandoned their claim to said premises, or any part thereof, and the said defendant made no expenditure whatsoever on said land referred to in the answer as an island, because of any action, statement or conduct of the said plaintiffs."

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11.

That there is no evidence to sustain finding No. 13 of the court, "that all the allegations contained in the complaint, except as herein otherwise found, are true, and all the allegations of the answer and the several defenses therein pleaded are untrue."

12.

That the evidence is insufficient to justify conclusion of law No. 1, "that the said plaintiffs are the owners, and entitled to the possession of the lots and tracts of land hereinbefore described, and the whole thereof, and that the said lots of plaintiffs extend westerly to the center of the main channel of Snake River. And the said defendant has no right, title, claim or interest therein, or any part thereof."

13.

That there is no evidence to sustain conclusion of law No. 2, "that the said plaintiffs are not barred of any right to bring this action by Section- 4036, 4037 or 4043 of the Revised Statutes," and affirmatively shows that the plaintiffs are barred by said Sections of the Statutes.

14.

That the evidence is insufficient to sustain conclusion of law No. 3.

15.

That the evidence is insufficient to sustain the decree based upon the foregoing facts and each and every one of the findings therein

made in so far as it decreed the plaintiffs to be the true and
100 lawful owners of those tracts and parcels of land which lie between the Government meander line on Lots 3 and 4 of Section 22, Lots 1 and 2 of Section 27, Lots 1 and 2 of Section 28, and Lot 1 of Section 33, Township 8, N. R. 5, W. B. M., Canyon County, Idaho, and the center of the main channel of Snake River; and decreed that all adverse claims of defendant, and of all persons claiming, or to claim said premises, or any part thereof, under or through said defendant, to be invalid and groundless.

Specifications of Errors of Law.

The defendant specifies the following errors of law:

1.

The court erred in entering judgment and decree, findings of fact and conclusions of law in this case wherein and whereby it decreed the plaintiffs to be the owners of those tracts and parcels of land which lie between the Government meander line on Lots 3 and 4 of Section 22. Lots 1 and 2 of Section 27. Lots 1 and 2 of Section 28, and Lot 1 of Section 33, Township 8, N. R. 5, W. B. M., Canyon County, Idaho, and decreed that all adverse claims of the defendant, and all persons claiming, or to claim, said premises, or any part thereof, through or under said defendant, were invalid and groundless.

2.

The Court erred in making the findings of fact inconsistent with the evidence.

101 3.

The Court erred in assuming jurisdiction of the subject matter of this action.

4.

The decision and judgment are against the law, and are not supported by the evidence.

5.

The Court erred in sustaining plaintiffs' objection to the following questions asked the witness, C. F. Draper, on re-direct examination, and in sustaining plaintiffs' objection to the following offer of testimony by the same witness:

Q. Do you know who was known and commonly recognized as being the owner of this island in 1894 up to the time of this suit in the vicinity of this island?

Plaintiff objects as incompetent, irrelevant and immaterial. Sustained. Exception.

Q. Do you know who was commonly known and recognized as being in possession of this particular island during the time from 1894 up to the commencement of this suit in the vicinity of this island?

Same objection. Ruling reserved.

A. Yes, sir.
Q. Who?
A. Mr. Ramey.

Defendant now offers to prove by this witness that Mr. Ramey was recognized and reputed to be the owner of this island in question in the vicinity in which this island is located during the years from 1894 to 1905.

102

6.

The Court erred in sustaining plaintiffs' objection to the following questions asked the witness, C. F. Draper, re-called, and in sustaining plaintiff's objection to the following offer of testimony by the same witness:

Q. During these years you have testified to from 1894 to 1905, who was reputed the owner of this island in the vicinity where it is located?

Plaintiff objects for the reason the same is incomplete, irrelevant and immaterial. Sustained. Exception.

Q. State, if you know, who was possessed, who was reputed to be in possession of this property during the years from 1894 to 1905?

Plaintiff objects for the same reasons just given to the former question. Ruling reserved.

A. Mr. Ramey has been known as the owner.

Defendant offers to prove by this witness that during the years 1894 to 1905, Mr. Ramey, the defendant in this case, was reputed to be the owner of this island in the vicinity where the island is located.

7.

The Court erred in sustaining plaintiff's objection to the following questions asked the witness, John Hall, recalled, and in sustaining plaintiff's objection to the following offer of testimony by the said witness:

Q. State, if you know, who was the reputed owner of this island in controversy from the year 1894 to 1905 in the vicinity
103 where it is located?

Q. State, if you know, who was reputed to be in possession of this island during the years 1894 to 1905 in the vicinity where it is located?

Defendant offered to prove by this witness that the reputed owner of the island in controversy in the vicinity of which it is located from the year 1894 to 1905 was Mr. Ramey, the defendant.

8.

The Court erred in not sustaining defendant's objection to the introduction of a copy of the testimony of E. G. Jeffreys, taken at the former trial of this case.

Stipulation.

It is hereby stipulated by and between the attorneys for the respective parties in this action that the foregoing proposed statement on motion for new trial constitutes a full, true, complete and correct account of the proceedings on the trial of said action; that it contains a full and true statement of all the evidence taken and considered at the trial of said action stated in narrative form, except that plaintiffs' exhibits Nos. 1, 2, 3, 4 and 5, and defendant's exhibits 1 and 2, are not contained therein, and it is stipulated and agreed by and between the plaintiffs and defendant that said exhibits not included therein need not be presented as part of the transcript herein in case appeal is taken by either of the parties from the judgment entered herein or order denying or granting the motion for a new trial herein,
104 but the originals may be used in the Appellate Court upon such appeal if taken, and that the originals of said exhibits may be used upon argument on the motion for new trial herein.

That the time for preparing, serving and filing said statement on motion for new trial was duly extended by stipulation and orders of the court to and including August 16, 1911.

It is further stipulated that the said statement may be allowed, ap-roved and settled by the Court as and for a statement to be used on motion for a new trial of said action.

RICHARDS & HAGA,
Attorneys for Plaintiffs.
SMITH & SCATTERDAY,
Attorneys for Defendant.

(Title of Court and Cause.)

Order Settling Statement.

The above and foregoing statement on motion for new trial is hereby settled and allowed as the statement of the case in this action, and it contains all of the evidence stated in narrative form which was introduced on the trial of this cause, except Plaintiffs' Exhibits 1, 2, 3, 4 and 5, and Defendant's Exhibits 1 and 2; and also contains the exceptions taken by counsel for the defendant to the rulings of the Court during the trial of said cause.

Dated this 12th day of April, 1912.

ED. L. BRYAN,
District Judge.

105 (Title of Court and Cause.)

Stipulation.

It is hereby stipulated and agreed by and between the respective counsel for the above entitled parties that the defendant herein may have sixty days from June 17, 1911, in which to prepare, serve and file affidavits, a statement of the case, and bill of exceptions to be used on motion for a new trial, or on appeal to the Supreme Court.

RICHARDS & HAGA,
Attorneys for Plaintiffs.
SMITH & SCATTERDAY,
Attorneys for Defendant.

It is hereby ordered that the time for preparing, serving and filing affidavits, a statement of the case and bill of exceptions to be used on motion for new trial and to be used on appeal to the Supreme Court be, and the same is hereby extended sixty days from the 17th day of June, 1911, and the same shall have the same effect as if they had been prepared, served and presented within the time prescribed by law without any extension thereof.

Dated this 19th day of June, 1911.

ED. L. BRYAN,
District Judge.

Filed June 19, 1911.

(Title of Court and Cause.)

Order Overruling Motion for New Trial.

106 The application and motion of defendant for new trial herein came duly on for hearing on the 12th day of April, 1912, upon a statement of the case heretofore settled and allowed, Messrs. Richards & Haga appearing as counsel for the plaintiff, and Karl Paine and R. B. Scatterday for the defendant, and the motion having been regularly submitted, and the court being fully advised in the premises, the court ordered that said motion be overruled and denied.

Now, therefore, by reason of the law and the premises, it is hereby ordered and adjudged that defendant's motion for new trial be, and the same is hereby overruled and denied, to which defendant then and there excepted, which exception is hereby settled and allowed.

Dated this 12th day of April, 1912.

ED. L. BRYAN,
District Judge.

Filed April 25, 1912.

(Title of Court and Cause.)

Notice of Appeal.

To the plaintiffs, A. B. Moss and Frank C. Moss, and to Messrs. Richards & Haga, their attorneys, and to the Clerk of said Court:

You, and each of you, will please take notice that the defendant in the above entitled action, hereby appeals to the Supreme Court of the State of Idaho, from the judgment made and entered in the above entitled cause in favor of the plaintiffs and against the
107 said defendant on the 1st day of May, 1911, and from the whole thereof; and you will further take notice that the said defendant also appeals to the said Supreme Court from the order of the above entitled Court made in said cause on the 12th day of April, 1912, and filed and entered in the office of the Clerk of said Court on the 25th day of April, 1912, overruling and denying the said defendant's motion for new trial in said cause, and from the whole thereof.

KARL PAINE,
Residing at Boise, Idaho;
R. B. SCATTERDAY,
Residing at Caldwell, Idaho,
Attorneys for Defendant.

Due and legal service of the foregoing notice of appeal and a receipt of a copy thereof, admitted this 27th day of April, 1912.

RICHARDS & HAGA,
Attorneys for Plaintiffs.

Filed April 27, 1912.

(Title of Court and Cause.)

Certificate of Judge.

It is hereby certified that the following papers, to-wit: Judgment Roll, Notice of Motion for New Trial, Defendant's Statement on Motion for New Trial, and Plaintiffs' Exhibits 1, 2, 3, 4 and 5, and Defendant's Exhibits 1 and 2, all of which are of the records and files in this action, were submitted to the Judge of the District Court of the Seventh Judicial District of the State of Idaho, in and
108 for the County of Canyon, and by him used on the hearing of Defendant's motion for new trial in this case, and constitute all the records, papers and files used or considered by said Judge on such hearing.

ED. L. BRYAN,
District Judge.

Filed June 11, 1912.

(Title of Court and Cause.)

Order as to Original Exhibits.

It appearing to the Court that Plaintiffs' Exhibits 1, 2, 3, 4 and 5, and Defendant's Exhibits 1 and 2 are necessary upon the hearing of this cause on the appeal to the Supreme Court from the judgment made and entered herein on May 1, 1911, and on the appeal from the order overruling Defendant's motion for a new trial, it is hereby

Ordered, that the originals of all of said Exhibits may be transmitted to the Clerk of said Supreme Court to be used by either party on said appeal, and that it shall not be necessary to print such exhibits in the transcript.

ED. L. BRYAN,
District Judge.

Filed June 11, 1912.

(Title of Court and Cause.)

Stipulation.

109 It is hereby stipulated by and between the attorneys for the respective parties hereto that the foregoing transcript contains true, full and correct copies of the orders of the Court, findings of fact and conclusions of law, and judgment of the Court, and of all papers which constitute and make up the judgment roll in said cause (except the complaint and answer), and the notice of motion for new trial, the statement of the case on motion for new trial, stipulation for settlement of statement on motion for new trial, order allowing statement on motion for new trial, order overruling motion for new trial, certificate of judge as to papers used on motion for new trial, order of judge transmitting original exhibits to the clerk of the Supreme Court, and notice of appeal in the above entitled cause; that judgment was duly entered in said cause on May 1, 1911, and that a good and sufficient undertaking on appeal from the judgment and from the order overruling motion for new trial, was filed herein on the 27th day of April, 1912; that the statement on motion for new trial was served, lodged and settled within the time allowed by law and the stipulation of the attorneys extending time; that the complaint and answer are the same as contained in the transcript used on the former appeal of this action, and are omitted from this transcript pursuant to the stipulation of the attorneys hereto.

KARL PAINE,
R. B. SCATTERDAY,
Attorneys for Appellant.
RICHARDS & HAGA,
Attorneys for Respondents.

But Respondents in joining in this stipulation reserve the right to raise the question that neither the appeal nor motion for a new trial were taken or made within the time required by law.

110 Service of the foregoing transcript by receipt of a copy thereof admitted this 22 day of June, 1912.

RICHARDS & HAGA,
Attorneys for Respondents.

111 *Record Entries.*

No. 2069.

A. B. MOSS AND BROTHER, Respondents,
vs.
A. H. RAMEY, Appellant.

BOISE, IDAHO, January 23, 1913.

This cause having been heretofore set for hearing, now on this day the same was called, R. B. Scatterday and Karl Paine appearing for appellant, and O. O. Haga and McKeen F. Morrow appearing for respondents. Argument was had on respondent's motion to strike portions of the transcript and on the merits, whereupon the whole matter was submitted and by the court ordered taken under advisement.

BOISE, IDAHO, February 26, 1913.

This cause having been heretofore heard and submitted, now on this day the cause was again called, and it is ordered that said cause be reheard and resubmitted at the next May term of this court.

BOISE, IDAHO, May 5, 1913.

This cause having been heretofore set for hearing, now on this day the same was called, O. O. Haga appearing for respondents and Karl Paine and R. B. Scatterday appearing for appellant.

Argument was had on respondents' motion to strike out a portion of the transcript and on the merits, whereupon the whole matter was submitted and by the court ordered taken under advisement.

112 BOISE, IDAHO, May 12, 1913.

Counsel for respondent having heretofore filed his motion for a diminution of the record in this case, and said motion having been noticed for this day, now on this day the same was called, McKeen F. Morrow appearing for respondent and R. B. Scatterday appearing for appellant. Whereupon no objection being made, it was ordered that said motion for diminution of the record be granted.

BOISE, IDAHO, May 17, 1913.

This cause having been heretofore heard, submitted and taken under advisement by the court, and the court having fully consid-

ered the same, now on this day the cause was again called, and the decision of the court is delivered by Chief Justice Ailshie, to the effect that the judgment of the District Court be reversed.

It is therefore considered, adjudged and decreed by the court that the judgment of the District Court of the Seventh Judicial District in and for the county of Canyon in the above entitled cause be and the same hereby is reversed and the cause remanded for a new trial. Costs awarded in favor of appellant.

BOISE, IDAHO, June 14, 1913.

A petition for rehearing having been heretofore filed in behalf of respondent in the above entitled cause and the court having considered the same, it is ordered said petition for rehearing be granted and that the cause be reheard at the next Boise term.

BOISE, IDAHO, November 8, 1913.

This cause having been heretofore set for rehearing, now on this day the same was called, Karl Paine and R. B. Scatterday appearing for appellant, and O. O. Haga appearing for respondent. After argument the cause was submitted and by the court ordered taken under advisement.

113

BOISE, IDAHO, November 26, 1913.

This cause having been heretofore reheard, submitted and taken under advisement by the court, and the court having fully considered the same, now on this day the cause was again called, and the decision of the court is delivered by Justice Sullivan to the effect that the cause be remanded to the trial court for dismissal.

It is therefore considered, adjudged and decreed by the court, that the above entitled cause be and the same hereby is remanded to the District Court of the Seventh Judicial District in and for the county of Canyon, with directions to enter a judgment dismissing the action. Costs of appeal are awarded to appellant, in the sum of $144.20.

114 In the Supreme Court of the State of Idaho, April Term, 1913.

Filed May 17, 1913. I. W. Hart, Clerk.

A. B. MOSS & BRO., Respondents,

vs.

A. H. RAMEY, Appellant.

Riparian Ownership—Title to Islands—Law of the Case.

1. Under the holding of the Supreme Court of the United States, an island in Snake River of dry land which is surrounded by well defined channels of the stream and which island existed at the time the state was admitted into the Union and which was not in-

cluded in the public land survey and comprised an area larger than a legal subdivision authorized under the United States land surveys, did not pass from the government to the state on the admission of the state and did not pass to the upland or riparian proprietor by a patent to the abutting lots or subdivisions meandering the channel of the stream.

2. The general rule of res adjudicata or law of the case as recognized and announced by this court in Hall v. Blackman, 9 Ida. 555, does not apply in a case where a federal question is involved that may be reviewed on writ of error to the Supreme Court of the United States, and where subsequent to the decision by the state court the United States Supreme Court has held to a different rule and reversed the ruling of the state court prior to the hearing on a second appeal in another case involving the same question of law.

3. The rule of law heretofore adopted by the supreme court of this state is reaffirmed to the effect that a riparian owner
115 on a meandered stream or body of water, whether navigable or non-navigable, takes title to the center or thread of the stream.

Appeal from the District Court of the Seventh Judicial District for Canyon County. Hon. Ed. L. Bryan, Judge.

Suit to quiet title. Judgment for plaintiff. Defendant appealed. Reversed.

R. B. Scatterday and Karl Paine for appellant.
Richards & Haga for respondent.

116 AILSHIE, *C. J.*:

This case is here on appeal for the second time. (See A. B. Moss & Bro. v. Ramey, 14 Ida. 598). On the former appeal the judgment was reversed and the cause was remanded for the purpose of having the trial court pass upon the question of adverse possession as presented by the pleadings. The trial court heard the case and found against the defendant and in favor of the plaintiffs, and the defendant has prosecuted this appeal.

On the former appeal this court held that the lands in dispute between the meander line and the thread of the stream in the main channel of Snake river passed by patent from the United States, issued for the lots and legal subdivisions abutting upon the meander lines, and that the holder of the title to the upland took title to all the land between the meander line and the center or the main channel of the stream. The trial court had found upon the first trial that the land in dispute comprised "a large island and islands" aggregating about 120 acres and that between this island and the upland owned by the plaintiffs there is a "large channel of Snake river with well defined banks and channel varying in width from 100 to 300 feet and in depth from six to ten feet through which the water of Snake river regularly flows during a large portion of

the year, varying from three to six months, and some years the entire season."

This court held that, notwithstanding the fact that there was a high water channel between the main body of upland and this tract of land, that still this was a part of the mainland and that it passed by patent to the upland owner of the abutting lots and sub-
117 divisions and that the title thereto had passed from the government to the upland patentees and that the so-called island was no longer a part of the public domain. When the case went back for retrial, the pleadings were so amended as to reduce the issue merely to one of adverse possession, and the trial court found that issue against the defendant and in favor of the plaintiffs.

Since the last trial of this case, the Supreme Court of the United States in Scott v. Lattig, 33 Sup. Ct. Rep. 242, has held that an island in Snake River which was not included in the public land survey and which existed at the time Idaho was admitted into the Union, neither passed to the state by the admission of the state nor passed by patent to the uplands abutting on the nearest channel of the stream, and that an island which "was fast dry land" at the time of the admission of the state into the Union and at the time of the issuance of patent to the abutting upland does not pass by patent to the upland patentee. That holding is in conflict with the holding of this court in Lattig v. Scott, 17 Ida. 506, and is in some measure contrary to the views entertained and expressed by the court in Johnson v. Johnson, 14 Ida. 561, on the authority of which the case of A. B. Moss & Bro. v. Ramey was decided. To that extent this court must and does modify its holdings as announced in the above cases.

The question is at once presented as to whether the rule of res adjudicata or law of the case as heretofore recognized by this court in Hall v. Blackman, 9 Ida. 555, and Hunter v. Porter, 10 Ida. 86, should be or can properly be invoked in the case before us. We are of the opinion that the doctrine of law of the case cannot properly be invoked in a case like this. Where this court is not the court of final resort in the determination of the question presented and a writ of error may be taken to the Supreme Court of the
118 United States and such a writ is prosecuted and that court expresses a different view as to the law applicable to a given state of facts from that entertained by this court, it is our duty on a subsequent appeal in another case involving the same federal question to reconsider the question previously determined and render our judgment in conformity with what we understand to be the rule announced by the court of last resort on such question. This principle seems to be recognized by the authorities. (See U. S. v. D. & R. G. R. R. Co., 48 L. ed. 103; Zeckendorf v. Steinfeld, 56 L ed. 1156; Messinger v. Anderson, 56 L. ed. 1152; Bostwick v. Brinkerhoff, 27 L. ed. 73; 3 Cyc. 395; 2 Spelling, New Trial and Appellate Practice, sec. 691.)

Notwithstanding our previous decision in this case, we are of the opinion that the question as to whether or not this tract of land

is an island or detached public domain, or, as stated by the Supreme Court in Scott v. Lattig, supra, is "fast dry land," should be determined upon all the evidence the parties desire to submit and in the light of the decision of the Supreme Court in Scott v. Lattig, 33 Sup. Ct. Rep. 242.

For the foregoing reasons, we have concluded to reverse the judgment in this case and remand the cause to the trial court for a new trial on all the issues presented in the original complaint or that the parties may see fit to present by amended pleadings.

In remanding this case, we think it proper to suggest to the parties and to the trial court that it is not the purpose of this court to in any way recede from the rule heretofore announced to the effect that a riparian owner in this state on a meandered stream or body of water, whether navigable or non-navigable, takes title to the center or thread of the stream. (Johnson v. Hurst, 10 Ida.
119 308; Johnson v. Johnson, 14 Ida. 561; Lattig v. Scott, 17 Ida. 506; Uhlbright v. Baslington, 20 Ida. 539). On the other hand, it is the equally well-fixed purpose of the court to follow the views expressed by the Supreme Court of the United States in Scott v. Lattig, in reference to such islands or tracts of land as may fall within the purview of that decision wherein it may appear that title has not passed from the government to any patentee.

Judgment reversed and cause remanded for a new trial. Costs awarded in favor of appellant.

Stewart, J., concurs.

120 SULLIVAN, *J.* (concurring in part):

I concur in the conclusion reached to the effect that the general rule of res adiudicata or law of the case does not apply in this case. I also concur in the conclusion to reverse the judgment and remand the cause for a new trial on all of the issues presented in the original complaint, or that the parties may see fit to present by any amendment to the pleadings; but dissent as to the rule heretofore announced by this court to the effect that a riparian owner in this state takes title to the thread of the stream. My views upon that question are expressed in my dissenting opinions in the cases of Johnson v. Johnson, 14 Ida. 561, Lattig v. Scott, 17 Ida. 506. It has been held by the Supreme Court of the United States in Scott v. Lattig, 33 Sup. Ct. Rep., 242, and other cases, that upon the admission of a state into the Union, the ownership of the bed of navigable streams passed to the state, and if the thread of such navigable stream was the boundary of the state, the ownership passed to the state to the thread of the stream, subject to certain limitations mentioned in said decision. In the case of Scott v. Lattig, supra, referring to this matter, the court said: "That the subsequent disposal by the former (the United States) of the fractional subdivision on the east bank, carried with it no right to the bed of the river, save as the law of Idaho may have attached such a right to private riparian ownership."

It is there held that the disposal by the United States of the frac-

tional subdivisions on the eact bank of said river carried with it no right to the bed of the river.

We have no statute law whatever granting a private riparian owner the bed of the stream. In my view of the matter, the Supreme Court of this state has not the right or authority to donate any land that belongs to the state to a riparian owner, or to any one else.

Under the rule laid down in all of the decisions of the United
121 States Supreme Court on this question, the bed of Snake River, at least to the border line of the state, passed to the state and not to the riparian owner, and this court has no authority to donate the title thereof to any person.

122 Filed Nov. 26, 1913. I. W. Hart, Clerk.

In the Supreme Court of the State of Idaho, November Term, 1913.

A. B. Moss & Bro., Respondents,
vs.
A. H. Ramey, Appellant.

On Rehearing.

Sullivan, *J.*:

A rehearing was granted in this case and a re-argument was had at this term of our court. In our former opinion (see — Ida. —), the court stated as follows:

"For the foregoing reasons, we have concluded to reverse the judgment in this case and remand the cause to the trial court for a new trial on all of the issues presented in the original complaint or that the parties may see fit to present by amended pleadings."

That decision was rendered in view of the decision of the Supreme Court of the United States in Scott v. Lattig, 33 Sup. Ct. Rep. 242. This court had held that the riparian owner was the owner of an unsurveyed island in Snake River. The Supreme Court of the United States held that an island being in existence in Snake River when Idaho became a state did not pass to the state upon admission to statehood but remained the property of the United States subject to disposal by it.

On a former appeal of the case at bar (see Moss v. Ramey, 14 Ida. 599), this court reversed the trial court and held that the riparian owners were the owners of the land in question because of being the riparian owners of the land bordering on said stream opposite thereto, and a new trial was granted in order that the trial court might determine whether the plaintiffs' title had been divested

by reason of the adverse possession of the defendant. The
123 judgment was reversed and a new trial ordered, with leave to both parties to amend their pleadings. The defendant amended his pleadings to conform to the order of the court, setting up title by adverse possession. The cause was tried by the court and the court made findings of fact and conclusions of law in favor of

plaintiffs, based on the ground that they were the owners of the land in dispute by reason of being the riparian owners of land bordering on Snake River opposite thereto, and that their title had not been divested by reason of the adverse possession of said island by the defendant. The trial court found that by reason of the plaintiffs' being owners of the lots of land bordering on Snake River, their title extended westerly to the thread of the channel of said river and that the land in controversy was between the thread of the stream and said lots bordering thereon. There is here presented a federal question and the Supreme Court of the United States held in a similar case (Scott v. Lattig, 33 Sup. Ct. Rep. 242) that the riparian owner did not acquire title to this island by reason of being a riparian owner of land opposite thereto. The plaintiffs base their title to said island upon the fact that they are riparian owners opposite said island, and if this case is remanded to the trial court for a new trial, that court, under the decision of the Scott-Lattig case, must hold against the plaintiffs in this action. Their right to have the title quieted in them depends upon whether the island passed with the main land under or by virtue of the United States patent issued to their predecessors in interest. That is clearly a federal question and is decided decisively against them under the rule laid down in the Scott-Lattig case. The plaintiffs brought this action to quiet their title and their right to recover depends upon the strength of their own title and not upon the weakness of the defendant's title.

124 Before the defendant is required to defend his claim to the island, the plaintiffs must establish their right thereto, and in so doing must establish their title on the ground that their predecessor in interest acquired title to said land by reason of the patent issued to him by the government for the lots bordering on Snake River opposite said island. Under the decision of the Scott-Lattig case, the plaintiffs cannot establish their title to said land. That being true, they could not have their title quieted in this action, for the reason that under the facts and the law, they have no title and the writer of this opinion has no doubt but that under the pleadings and decision in this case a federal question is involved and that the final decision of this court may be reviewed by the Supreme Court of the United States upon a writ of error from that court. It would, therefore, be a useless act to remand the case for a new trial, as directed by this court in the opinion on the original hearing of this case.

We are not unmindful of the contention made by respondent that the decision of this court on the previous appeal is the law of the case and that we are bound to adhere to the conclusion reached at that time. That rule prevails in this state, as was stated in the previous opinion, but the facts of this case are peculiar, and we believe it our duty to dispose of each case on its own facts and circumstances so as to meet the requirements of the law as nearly as possible. If this land in controversy is still a part of the public domain, as is undoubtedly the case under the decision of the Supreme Court of the United States in the Scott-Lattig case, it is clearly our duty to take notice of that fact as it appears in the case and decide ac-

cordingly, even though we have previously decided to the contrary.

This case turns solely on a federal question, and we are bound
125 to follow the decisions of the federal Supreme Court as we understand them. This latter case runs counter to what this court had understood the previous decisions of that court to hold, and it is our intention to follow it as far as we think it goes. For these reasons we do not think that the rule of res adjudicata, or law of the case, applies in this case as it would apply if no federal questions were involved.

The cause is therefore remanded to the trial court with directions to enter a judgment dismissing the action. Costs are awarded to appellant.

Ailshie, C. J., and Stewart, J., concur.

126 In the Supreme Court of the State of Idaho.

A. B. Moss & Brother, a Copartnership, Consisting of A. B. Moss and Frank C. Moss, Respondents,

vs.

A. H. Ramey, Appellant.

Petition for Writ of Error.

To the Honorable James F. Ailshie, Chief Justice of the Supreme Court of the State of Idaho:

Now comes the above named respondents, A. B. Moss and Frank C. Moss, co-partners under the firm name and style of A. B. Moss & Brother, and complain and allege:

That they are citizens, and that each of them is a citizen, of the United States of America;

That on the 17th day of May, 1913, the Supreme Court of the State of Idaho rendered a final judgment against your petitioners in the above entitled cause, and thereafter a petition for rehearing was filed, presented, considered and allowed, and on the 25th day of November, A. D. 1913, this Honorable Court rendered its decision in said cause on rehearing, which decision thereupon and on said 26th day of November, 1913, became the final judgment of this Court in said cause;

That the said respondents and petitioners were and are aggrieved in that, in said final judgment and the proceedings had thereon in this cause certain errors were committed to their prejudice, and particularly in this, that the said final judgment and decision of
127 the Supreme Court of the State of Idaho in said cause deprived the said respondents and petitioners of rights, privileges and immunities secured to them, and each of them, under the constitution and laws of the United States;

That in said action your petitioners claimed the right to the possession and enjoyment of certain lands described in the complaint in said cause, and the title to which was involved in said action, under the public land laws of the United States, and the decision of

this Honorable Court is against the title and right claimed by your petitioners, and, as they believe, contrary to the constitution and statutes of the United States relating to the sale and disposition of public lands, all of which will more fully appear by reference to the record and proceedings in said cause and from the assignment of errors filed herewith, and your petitioners claim the right to remove said judgment and decree to the Supreme Court of the United States by writ of error under Section 237 of The Judicial Code of the United States, because and for the reason above set forth and as will appear more fully from the said assignment of errors and by the record in said cause.

Wherefore, your petitioners pray for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Idaho and the Judges thereof, to the end that the record in said matter may be removed to the Supreme Court of the United States, and the errors complained of by your petitioners may be examined and corrected and said judgment and decree reversed and set aside, and for citation and supersedeas; and your petitioners will ever pray.

A. B. MOSS,
FRANK C. MOSS,
Petitioners,
By RICHARDS & HAGA,
Their Attorneys.

128 In the Supreme Court of the State of Idaho.

UNITED STATES OF AMERICA,
State of Idaho, ss:

Let the Writ of Error issue upon the execution of a bond by the respondents, A. B. Moss & Brother, to the appellant, A. H. Ramey, in the sum of two thousand Dollars ($2,000.00), such bond when approved to act as a supersedeas.

Dated December 3d, 1913.

J. F. AILSHIE,
Chief Justice Supreme Court of Idaho.

[Endorsed:] No. 2069. In the Supreme Court of the State of Idaho. A. B. Moss & Brother, a copartnership consisting of A. B. Moss and Frank C. Moss, Respondents, vs. A. H. Ramey, Appellant. Petition for Writ of Error. Filed Dec. 3, 1913. I. W. Hart, Clerk. Richards & Haga, Boise, Idaho.

129 In the Supreme Court of the State of Idaho.

A. B. Moss & Bro., a Copartnership Consisting of A. B. Moss and Frank C. Moss, Respondents,
vs.
A. H. Ramey, Appellant,

Assignment of Errors.

Now come the above named respondents, by their attorneys, and respectfully submit that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Idaho in the above entitled cause there is manifest error in this, to-wit:

1. That said Supreme Court erred in holding, adjudging and deciding that the above named respondents were not the owners of that certain tract, piece and parcel of land described in paragraph VI of the complaint herein, and which extends from a point near the south boundary line of Lot 2 of Section 28, Township 8 North, Range 5 West, B. M., northerly to a point near the north boundary line of Lot 1 of Section 27, said township and range, and westerly from the Government meander line on said Lots 1 and 2 of said Section 27, and Lots 1 and 2 of said Section 28, to the center of the main channel of Snake River.

2. That said Supreme Court erred in holding, adjudging and deciding that the title of said respondents to the tract of land above described, and the right of respondents to the possession thereof, was not better or superior to the title or right of appellant to said tract of land.

130 3. That said Supreme Court erred in holding, adjudging and deciding that Roswell P. Clement, who obtained title under patent from the United States to Lots 1 and 2 of Section 28, and Lot 1 of Section 33, said Township 8 North, Range 5 West, B. M., and who thereafter conveyed the right, title and interest so acquired under said patent to the respondents herein, did not acquire any right, title or interest in or to the lands and premises here in controversy and described in paragraph VI of the complaint herein, or to that portion thereof lying between the west meander line of said Lots 1 and 2 of said Section 28 and Lot 1 of said Section 33 and the main channel of Snake River.

4. That said Supreme Court erred in holding, adjudging and deciding that Frank Heron, who obtained title under patent from the United States to Lots 1 and 2 of Section 27, and Lots 3 and 4 of Section 22, Township 8 North, Range 5 West, B. M., and who thereafter conveyed the right, title and interest so acquired under said patent to the respondents herein, did not acquire any right, title or interest in or to the lands and premises here in controversy and described in paragraph VI of the complaint herein, or to that portion thereof lying between the west meander line of said Lots 1 and 2 of Section 27 and Lots 3 and 4 of Section 22, Township 8 North, Range 5 West, B. M., and the main channel of Snake River.

5. That the said Supreme Court erred in holding, adjudging and

deciding that the meander line of the United States Government survey along the west side of Lots 3 and 4 of said Section 22, and Lots 1 and 2 of said Section 27, and Lots 1 and 2 of said Section 28, and Lot 1 of Section 33, is a line of boundary and that the patents from the United States to the predecessors in interest of
131 the said respondents, who entered and acquired title to the said lots under the Public Land Laws of the United States, conveyed no right, title or interest to the patentees named in such patents to any land lying between said meander line and the main channel of Snake River.

6. That the said Supreme Court erred in holding, adjudging and deciding that the right, title or interest of riparian proprietors holding title to riparian land under patents issued by the United States under the Public Land Laws to unsurveyed land lying between the meander line of the land described in such patents and the main channel of the river is not prior and superior to the claim, title or interest of a squatter or settler on such unsurveyed land.

7. That the said Supreme Court erred in not affirming the judgment or decree entered by the trial court in said cause.

8. That the judgment and decision of said Supreme Court is repugnant to and in conflict with the laws of the United States relating to the sale and disposal of public lands.

9. That the judgment and decision of said Supreme Court is repugnant to and in conflict with the Fourteenth Amendment to the Constitution of the United States, in that it deprived these respondents of their property without due process of law, particularly in this, that the question decided by the Court was not in issue in the cause and did not arise and could not be determined upon the record before the court.

10. And these respondents further say that in the aforesaid action there was drawn in question the extent of the grants made by the United States under patents to riparian land situated on the main land opposite the land in dispute; that these respondents in
132 said action contended that the patents from the United States to respondents' predecessors in interest for the riparian land adjacent to the land in dispute also conveyed to such patentees the right, title and interest of the United States to the land here in dispute, and that by reason of such patents the right, title and interest of respondents in and to such land was better and superior to the claim, right or interest of the said appellant, who claims no title therein or thereto from the United States or by virtue of a compliance with any of the public land laws under which title can be obtained to the public lands of the United States, but claimed title thereto by adverse possession under these respondents; and the said Supreme Court of the State of Idaho by its final decision in this cause held and decided adversely to and against the contention so made by these respondents, and held and decided adversely to and against the right, title and privilege so especially set up and claimed under the public land laws and the Constitution and statutes of the United States; and said Supreme Court held and decided in its said final decision that these respondents had no right, title or interest whatso-

ever in or to the said land so in controversy, and that the said land was a part of the unsurveyed public domain.

Wherefore, for this and other manifest errors appearing in the record, the said A. B. Moss and Frank C. Moss, copartners under the name and style of A. B. Moss & Bro., respondents herein, pray that the judgment of the said Supreme Court of the State of Idaho be reversed and set aside, and held for naught, and that judgment be rendered for these respondents, granting them their rights under the laws and statutes of the United States, and that their right, title and interest in and to the said lands and premises so in controversy
133 be declared better and superior to the right and claim of the said appellant, and that they be restored to all things which they have lost by this action and because of the said judgment and decision, and that they may have judgment for their costs.

JAMES H. RICHARDS,
OLIVER O. HAGA,
Attorneys for Respondents.

Office: Idaho Building, Boise, Idaho.

[Endorsed:] In the Supreme Court of the State of Idaho. A. B. Moss & Bro., a copartnership consisting of A. B. Moss and Frank C. Moss, Respondents, vs. A. H. Ramey, Appellant. Assignment of Errors. Filed Dec. 3, 1913. I. W. Hart, Clerk. Richards & Haga, Boise, Idaho.

134 In the Supreme Court of the State of Idaho.

A. B. Moss & Brother, a Co-partnership, Consisting of A. B. Moss and Frank C. Moss, Respondents,
vs.
A. H. Ramey, Appellant.

Bond.

Know all men by these presents, That we, A. B. Moss & Brother, as principal, and J. E. Clinton and F. F. Johnson, of Boise, Idaho, as sureties, are held and firmly bound unto A. H. Ramey in the sum of Two Thousand Dollars ($2,000.00), to be paid to the said A. H. Ramey, his heirs or assigns, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 6th day of December, A. D. 1913.

Whereas, the above named respondents have prosecuted a Writ of Error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Idaho;

Now, therefore, the condition of this obligation is such, that if the above named respondents, plaintiffs in error in said Writ, shall

prosecute their said Writ of Error to effect, and answer all costs and damages that may be adjudged if they shall fail to make
135 good their plea, then this obligation to be void; otherwise, to remain in full force and effect.

A. B. MOSS & BRO.
By A. B. MOSS. [SEAL.]
J. E. CLINTON. [SEAL.]
F. F. JOHNSON. [SEAL.]

Signed, sealed and delivered in the presence of:
O. O. HAGA,
——— ———,
Witnesses.

STATE OF IDAHO,
County of Ada, ss:

J. E. Clinton and F. F. Johnson, whose names are subscribed to the foregoing instrument, being severally duly sworn, each for himself says: That he is of lawful age and is a citizen of the State of Idaho and a resident freeholder in said State; that he knows the contents of the foregoing instrument to which he has attached his name, and that he is worth the amount specified as the penalty thereof over and above his just debts and liabilities, exclusive of property exempt from execution.

J. E. CLINTON.
F. F. JOHNSON.

136 Subscribed and sworn to before me, this 6th day of December, 1913.

[SEAL.] EDNA L. HICE,
Notary Public for Ada County, Idaho.

Bond approved and to operate as a supersedeas.
Dated December 11th, 1913.

J. F. AILSHIE,
Chief Justice of the Supreme Court of the State of Idaho.

O. K. as to form and sufficiency.
KARL PAINE,
Att'y for Ramey.

Endorsed: Filed Dec. 8th, 1913. I. W. Hart, Clerk.

137 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Alfred H. Ramey, Designated as A. H. Ramey, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C.,

within sixty (60) days from the date hereof, pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of Idaho, wherein Albert B. Moss and Frank C. Moss (co-partners, as A. B. Moss & Bro.), are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Idaho, this 12th day of December, 1913.

[Seal of Supreme Court, State of Idaho.]

J. F. AILSHIE,
Chief Justice Supreme Court of Idaho.

Attest:

I. W. HART,
Clerk Supreme Court of Idaho.

138 I, attorney of record for the Defendant in Error in the above entitled cause, hereby acknowledge due service of the above citation, this 12th day of December, 1913.

KARL PAINE,
Attorney for Alfred H. Ramey.

[Endorsed:] No. 2069. In the Supreme Court of the State of Idaho. Albert B. Moss and Frank C. Moss, Plaintiffs in Error, vs. Alfred H. Ramey, Defendant in Error. Citation. Filed Dec. 12, 1913. I. W. Hart, Clerk. Richards & Haga, Boise, Idaho.

139 *Certificate of Lodgment.*

SUPREME COURT,
State of Idaho, ss:

I, I. W. Hart, Clerk of the Supreme Court of the State of Idaho, do hereby certify that in the matter of A. B. Moss & Brother v. A. H. Ramey, there was lodged with me, as such clerk, on December 8th, 1913, the original bond, of which a copy is herewith set forth; and that on the 12th day of December, 1913, there were lodged with me two copies of the Writ of Error, as herein set forth, one for defendant and one to file in my office.

In witness whereof, I have hereunto set my hand and fixed the seal of said court, at my office in Boise, Idaho, this 12th day of December, 1913.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk Supreme Court of Idaho.

140 In the Supreme Court of the State of Idaho.

A. B. Moss & Brother, a Co-partnership, Consisting of A. B. Moss and Frank C. Moss, Respondents,

vs.

A. H. Ramey, Appellant.

Certificate of Clerk.

I, I. W. Hart, clerk of the supreme court of the State of Idaho, do hereby certify the foregoing transcript to be a full, true and correct copy of the record and proceedings in the above entitled cause, as the same remains of record and on file in my office, including the original Writ of Error, Petition for Writ of Error and allowance thereof, and Citation; and that the same constitute the return to the annexed writ of error.

In witness whereof, I have hereunto set my hand and affixed the seal of the court this 24th day of January, 1914.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk Supreme Court, State of Idaho.

Endorsed on cover: File No. 24,036. Idaho Supreme Court. Term No. 346. Albert B. Moss and Frank C. Moss copartners under the name and style of A. B. Moss & Bro., plaintiff in error, vs. Alfred H. Ramey. Filed January 29th, 1914. File No. 24,036.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 61.

A. B. MOSS AND FRANK C. MOSS, PLAINTIFFS IN ERROR,

vs.

A. H. RAMEY.

MOTION FOR WRIT OF CERTIORARI, EXHIBITS THERETO, AND STIPULATION OF COUNSEL AS TO SAME.

In the Supreme Court of the United States.

No. 61.

A. B. Moss and FRANK C. Moss, Plaintiffs in Error,
v.
A. H. RAMEY, Defendant in Error.

Comes now the undersigned, counsel for the defendant in error, and petitions and moves the court for an order directing the clerk of the Supreme Court of Idaho to certify to the clerk of the Supreme Court of the United States, the following:

First. The opinion of the Supreme Court of Idaho in the above entitled cause, rendered on the 23rd day of March, 1908 (14 Idaho 593; 95 Pac. 513), a copy of which is hereto attached and marked Exhibit A.

Second. Exhibit 1 of plaintiffs' proof, consisting of patent from the United States to Roswell Clement for lot numbered 1 of Section 33, and lots numbered 1 and 2 of Section 28, T. 8 N., R. 5 W., B. M., recorded in Book 1 of Patents at Page 142 of the records of the County Recorder's Office of Canyon County, Idaho, offered in evidence as disclosed on page 13 of the transcript of record herein, copy of which is hereto attached, marked Exhibit B, and made a part hereof.

Third. Plaintiffs' Exhibit 2, referred to on page 13 of said transcript, consisting of warranty deed from Roswell Clement and wife

to A. B. Moss and Bro. for lands described therein, a copy of which is hereto attached, marked Exhibit C, and made a part hereof.

Fourth. Plaintiffs' Exhibit 3, referred to on page 13 of said transcript, consisting of a patent from the United States to Frank Herron for certain lots, etc., copy of which is hereto attached, marked Exhibit D, and made a part hereof.

Fifth. Plaintiffs' Exhibit 4, referred to on page 13 of said transcript, consisting of a deed from Frank Herron for certain lots, a copy of which is hereto attached, marked Exhibit F, and made a part hereof.

Sixth. Plaintiffs' Exhibit 5, referred to on page 13 of said transcript, consisting of a blueprint of the original plat showing the location of lots in question on Snake River, as shown by the U. S. Surveyor General, a copy of which is hereto attached, marked Exhibit E, and made a part hereof.

Seventh. Defendant's Exhibit One, referred to on page 18 of said transcript, consisting of a blueprint showing the location of lots in question on Snake River, as shown by County Surveyor J. S. Millikin, a copy of which is hereto attached, marked Exhibit G, and made a part hereof.

That said order be issued for the reason that the exhibits mentioned are necessary to a clear and full understanding of the issues and law involved in the trial of the above entitled cause.

As a cause for the delay in presenting this motion counsel for defendant in error respectfully represents:

That he has not appeared as counsel therein after the first trial in the trial court, in 1905, until October 7, 1915, when he was employed to represent defendant in this court, and the defect in the record which this motion seeks to cure was not discovered until it became necessary to brief the cause and this motion is made as soon thereafter as was practicable to secure copies of the exhibits above described, upon which to base this petition and motion.

Wherefore defendant in error prays that the necessary order be made for the certification of said exhibits to the clerk of this court.

WILL R. KING,
Solicitor for Defendant in Error.

EXHIBIT "A."

(Supreme Court of Idaho, March 23, 1908.)

Appeal from District Court, Canyon County; Frank J. Smith, Judge.

Action by A. B. Moss and another against A. H. Ramey. Judgment for defendant, and plaintiffs' appeal. Reversed.

Richards & Haga, for appellants.
Frank Harris, for respondent.

STEWART, *J.:*

This is an action to quiet title to lots 3 and 4 in section 22, lots 1 and 2 in section 27, lots 1 and 2 in section 28, and lot 1 in section 33, all in township 8 north, of range 5 west, Boise meridian.

The plaintiffs claim to be the owners in fee of this property, and allege that the defendant claims an interest therein to that portion of said lots lying along and bordering on the right bank of the main channel of Snake river, and extending from near the south line of lot 1, in section 33, northerly to a point some distance south of the north line of lot 3, section 22, and extending easterly from the said right bank of the main channel of Snake river to a ravine or slough passing through and lying wholly within said lots and connecting it at both ends of such ravine or slough with the main channel of Snake river, but allege that said claim of the defendant is without right, is unjust, and unfounded, and a cloud upon plaintiffs' title thereto. The plaintiffs further allege that the portion of the main channel of Snake river lying within the north and south boundaries of the tract of land described is not navigable, and the westerly limits of said lots extend to the center line of the main channel of said Snake river, and that said Snake river in the vicinity of said lots is not a navigable stream.

The defendant specifically denies the allegations of the plaintiffs' complaint, and alleges affirmatively that the defendant has had continuous, actual, open, adverse, notorious, and exclusive possession of all of that certain island involved in this case lying west of and adjoining the channel of Snake river, west of section 27; and that the plaintiffs and their predecessors in interest are barred of any right to bring this action under the provisions of sections 4036, 4037, and 4043, of the Revised Statutes of Idaho of 1887. The defendant further alleges that there is an island bordering upon and lying west of the east channel of Snake river, west of the lots described in the plaintiffs' complaint, and that said island is claimed, owned, and occupied by the defendant and has been in his possession under claim of ownership since 1893, with full notice and knowledge to the plaintiffs; that on October 5, 1868, the lots described in plaintiffs' complaint were surveyed by the government of the United States, and the west boundary thereof thereby established and recognized as being the east bank of the east channel of Snake river, and the lots described in plaintiffs' complaint by the patents to plaintiffs' predecessors in interest limited the quantity to 190.60 acres, and that it was not intended to convey any land to either of the plaintiffs or their predecessors in interest west of the east bank of said east channel of Snake river; that the plaintiffs nor their predecessors in interest ever claimed or established any right whatever in and to any portion of said island; that the plaintiffs have recognized the same as government land, and attempted to procure a title thereto through an attempt of one Ruth Moss to enter the same as desert land, but that said application was rejected by the government on the ground that the same was not desert land. The defendant further alleges that he has expended a large sum of money in the improvement and cultivation of said island, made with the full knowledge and acquiescence of plaintiffs. Upon these issues the court made his findings of fact, and in effect found that the plaintiffs have succeeded to the title in fee of lots 3 and 4 in section 22, lots 1 and 2 in section 27, lots 1 and 2 in section 28, and lot 1 in section 33, all in township

8 north, range 5 west, Boise meridian, according to the official plat of the survey of said land, and that the plaintiffs and their predecessors in interest have owned the fee to the same since the year 1891; that the eastern boundary of said lots 1 and 2 of section 27, and lots 1 and 2 of section 28, meanders within a short distance of an easterly channel of Snake river, varying from a few feet at the north side of said tract to about 100 feet on the south side; that running immediately west of said meander line is a large channel of Snake river with well-defined banks, the channel varying in width from 100 to 300 feet, and the depth from 6 to 10 feet, through which the water of Snake river regularly flows during a large portion of the year, varying from 3 to 6 months, and some years the entire season; that said channel is an ancient channel of Snake river, and has been such for 30 years; that immediately west of the east bank of said channel is a large island and islands comprising in the aggregate 120 acres of land more or less which is surrounded on the easterly side by the smaller channel of Snake river and on the southerly and westerly side by the main channel, which main channel has well-defined banks and channels with water flowing therein during the entire season of each year, the island being the property described in defendant's answer and alleged to belong to the defendant; and that said island is unsurveyed government land, and when surveyed according to the Idaho survey would be in section 28, township 8 north, range 5 west; that the defendant since the year 1893 has had continuous, actual, open, adverse, notorious, and exclusive possession of said island lying west of the center line of said easterly channel, which said island is west of said section 27, town. and range as above given, and has held said island under claim of ownership exclusive as against the plaintiffs and their predecessors in interest, continuously since 1893, and since said time has had said land inclosed by good and substantial inclosure and has cultivated the same to crops during each year; that the plaintiffs' lands are limited to the number of acres described in their patent, and extend only to the water's edge of the most eastern channel east of said island; that the plaintiffs nor their predecessors in interest have made no claim or asserted any right to said island since the year 1895; that the defendant, believing plaintiffs claimed no interest to said island, built a house thereon and resided upon said premises for a number of years and made valuable improvements thereon, and has continued to hold and claim the same as his exclusive property.

As a conclusion of law, based upon such findings of fact, the court holds that the plaintiffs are barred from recovering or asserting any right in or to said island or any part thereof, and are barred from the right to bring any action, under the provisions of sections 4036, 4037, and 4043 of the Revised Statutes of 1887 of this state. Upon these findings and conclusions of law the court rendered judgment in favor of the defendant for costs. The plaintiffs moved for a new trial, upon a statement duly prepared and settled, which was overruled, and the plaintiffs appeal to this court from the order overruling the motion for a new trial and from the judgment.

From the record it appears that when the government surveyed

the lands in sections 22, 27, 28, 33, and 34, and filed a plat thereof, Snake river was shown to be the west boundary line of lots 3 and 4 in Section 22, lots 1 and 2 in section 27, lots 1 and 2 in section 28, and lot 1 in section 34, and that no island was surveyed or platted lying in Snake river in front of any of said lots. The defendant introduced in evidence a plat made by John S. Milligan, county surveyor of Malheur county, Or., in which it is shown that immediately west of lots 1 and 2 in section 27, and lots 1 and 2 in section 28, there is an island, and that the main channel of Snake river forms a westerly boundary of said island, and a smaller channel forms an easterly boundary, the latter carrying only a part of the water as shown by the findings; that these two channels surround a body of land consisting of about 120 acres, the island in controversy.

The record presents two questions for consideration. The first is, did the grant covering lots 1 and 2 in Section 27, and lots 1 and 2 in section 28, convey to the patentee as a part of said lots, the land or island in controversy in this case? In other words, did the riparian owner take title to the thread of the main channel of Snake river? This question has been fully discussed and recently passed upon by this court in the case of Johnson v. Johnson, 95 Pac. 499, which opinion we approve in this case, and consider that the same fully disposes of said question adversely to respondent.

The defendant also relies upon the defense that the plaintiffs and their predecessors in interest have not been seised or possessed of the premises in controversy within five years prior to the commencement of said suit, and as a result are barred by the statute of limitations. This defense is based upon the statute which provides that no recovery of real property can be maintained unless it appears that the plaintiffs, their ancestors, predecessors, or grantors, were seised or possessed thereof within five years before the commencement of such action. Rev. St. 1887, Section 4036. The defendant claims that he has been in continuous, actual, open, adverse, notorious, and exclusive possession of the property in controversy since the year 1893; and under this allegation of the answer the court found the same to be true, and found that said defendant has held said property under claim of ownership exclusively against the plaintiffs and their predecessors in interest continuously and against all other persons whatsoever since the year 1893, and has had said property inclosed by good and substantial inclosure, and has cultivated the same during each year since 1893. The defendant contends that the same facts which justified the court in making the finding that he had been in the exclusive possession of the said property for more than five years last past constituted a disseisin of said property, and by reason of such fact that the plaintiffs cannot maintain this action because they and their predecessors in interest have not been seised or possessed of said property within five years before the commencement of this action. Rev. St. 1887, Section 4036, provides: "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question within five years before the commencement of the action."

The findings in this case are to the effect that the property in controversy was unsurveyed government land, and that the defendant entered into possession of the same, claiming that the same was government land and that the plaintiffs had no title thereto, and that the defendant has held possession of said property under said claim since the year 1893.

The question then arises: Will such facts defeat the plaintiffs' right to recover said property? The theory of the trial court was that the plaintiffs could not recover in this action because the property in controversy was unsurveyed government land and did not belong to the plaintiffs, and that the defendant entered upon said land as government land and has had the exclusive possession thereof since the year 1893. This case was tried and decided by the trial court upon the theory that the land in controversy was unsurveyed government land, but this court finds that the legal title was in the riparian owner. What finding the court would have made upon the question of adverse possession had such court determined that the legal title was in the riparian owner, this court is unable to say. For the reason stated in the opinion in Johnson v. Johnson, supra, this case must be reversed. And inasmuch as the court's findings were made upon a wrong theory of the law, we deem it only just to all parties to grant a new trial in order that the court may determine whether plaintiffs' title has been divested or right of action arrested by adverse possession of the defendant.

The judgment will be reversed, and a new trial ordered, with leave to either party to amend their pleadings. Costs awarded to appellants.

Ailshie, C. J., concurs. Sullivan, J., dissents.

(Copy.)

EXHIBIT "B."

Plaintiff's Exhibit "1."

Homestead Certificate No. 660, Application 1577, *ss:*

To all to whom these presents shall come, Greeting:

Whereas, there has been deposited in the General Land Office of the United States a Certificate of the Register of the Land Office at Boise City, Idaho Territory, whereby it appears that, pursuant to the Act of Congress approved 20th May, 1862, "to secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of Roswell W. Clement has been established and duly consummated, in conformity to law, for the Lot numbered One of Section Thirty-three, and the Lots numbered One and Two of Section Twenty-eight, in Township Eight North of Range Five West of Boise Meridian, in Idaho Territory, containing sixty-five acres and thirty hundredths of an acre, according to the official plat of the survey of the said land returned to the General Land Office by the Surveyor General.

Now, know ye, that there is, therefore, granted by the United States unto said Roswell W. Clement the tract of land above described.

To have and to hold the said tract of land, with the appurtenances thereof, unto the said Roswell W. Clement, and to his heirs and assigns, forever, subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws and decisions of Courts, and also subject to the right of the proprietor of a vein or lode, to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

In testimony whereof, I, Benjamin Harrison, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington the twenty-fifth day of March, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

BENJAMIN HARRISON.

By the President:
By M. McKEAN, *Secretary.*

Recorded Vol. 2 page 187. J. M. Townsend, Recorder of the General Land Office.

Filed for record at 1:50 o'clock P. M. September 15, A. D. 1890, and recorded at the request of R. W. Clement.

S. B. MANN, *Recorder.*

Endorsed on margin: (Compared. Patents Book 2 page 297.)

EXHIBIT "C."

Plaintiff's Exhibit "2."

This indenture, Made the sixth day of July, in the year of our Lord One Thousand Eight Hundred and ninety-one between Roswell W. Clement and Harriet A. Clement, of Ada County, State of Idaho, parties of the first part, and A. B. Moss and Brother, parties of the second part,

Witnesseth: That the said parties of the first part, for and in consideration of the sum of ($2,000.00) Two Thousand Dollars, lawful money of the United States to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, convey and confirm unto the said parties of the second part and to their heirs and assigns, forever, all of their right, title and interest in a certain piece or parcel of land lying and situate in the County of Ada, State of Idaho, and bounded and described as follows, to-wit:

Lot No. One of Section thirty-three, and the lots Number one and two of Section twenty-eight, in Township eight North of Range five West of the Boise Meridian, containing 65.30 (Sixty-five and thirty-hundredths) acres, more or less.

It is also agreed to and expressly understood that the foregoing piece or parcel of land is subject to a certain mortgage held by The Jarvis Conklin Mortgage Trust Company, viz., for $500.00 (Five Hundred Dollars) dated July 1, 1889, due five years from date, with interest at six per cent per annum, and that the parties of the second part accept of this deed subject to said mortgage and become responsible for the payment of said mortgage.

Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the rents, issues and profits thereof.

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said parties of the second part and to their heirs and assigns forever. And the said parties of the first part and their heirs, the said premises in the quite and peaceable possession of the said parties of the second part, their heirs and assigns, against the said parties of the first part and their heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

(Signed) ROSWELL W. CLEMENT.
HATTIE A. CLEMENT.

Signed, sealed and delivered in the presence of:
H. M. CHILDERS.

STATE OF IDAHO,
County of Ada, ss:

On this 19th day of July, A. D. 1891, before me, H. M. Childers, a Justice of the Peace in and for said County of Ada, State of Idaho, personally appeared Roswell W. Clement and Harriet A. Clement, his wife, personally to me known to be the persons described in and whose names are subscribed to the within instrument and acknowledged to me that they executed the same; and the said Harriet A. Clement (described as a married woman) upon an examination without the hearing of her husband, being by me acquainted with the contents of said instrument, acknowledged to me that she executed the same and that she does not wish to retract such execution.

In witness whereof, I have hereunto set my hand the day and year last above written.

[SEAL.] H. M. CHILDERS,
Justice of the Peace.

Recorded at the request of A. B. Moss and Bro. July 22, 1891, at 8:30 o'clock A. M.

SHERMAN G. KING, *Recorder,*
By J. H. WICKERSHAM, *Deputy.*

Deeds, Book 18, page 500.

(Copy.)

EXHIBIT "D."

Plaintiff's Exhibit "3."

THE UNITED STATES OF AMERICA:

Certificate No. 1295.

To all to whom these presents shall come, Greeting:

Whereas, Frank Herron, of Ada County, Idaho, has deposited in the General Land Office of the United States a certificate of the Register of the Land Office at Boise City, Idaho, whereby it appears that full payment has been made by the said Frank Herron, according to the provisions of the Act of Congress of the 24th of April, 1820, entitled: "An Act Making Further Provisions for the Sale of the Public Lands," and the Acts supplemental thereto, for the Lots numbered one and two of Section Twenty-seven, and the Lots numbered three and four of Section twenty-two in Township Eight North of Range five west of the Boise Meridian, in Idaho, containing one hundred twenty-five acres and twenty hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said Frank Herron.

Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant unto the said Frank Herron, and to his heirs, the said tract above described.

To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Frank Herron, and to his heirs and assigns, forever, subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws and decisions of Courts, and also subject to the right of the proprietor of a vein or lode, to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

And it is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

In testimony whereof, I, Benjamin Harrison, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington the first day of April, in the year of our Lord one thousand eight hundred and

ninety-two, and of the Independence of the United States the one hundred and sixteenth.

BENJAMIN HARRISON.

By the President:

By M. McKEAN, *Secretary.*

Recorded, Vol. 4A, page 160.

D. P. ROBERTS,
Recorder of the General Land Office.

Filed for record at 8:25 o'clock A. M. June 13", A. D. 1892, and recorded at the request of A. B. Moss & Bro.

SHERMAN G. KING, *Recorder,*
By JAS. H. MORGAN, *Deputy.*

Endorsed on margin: (Compared. Patents Book 3, page 8.)

EXHIBIT "F."

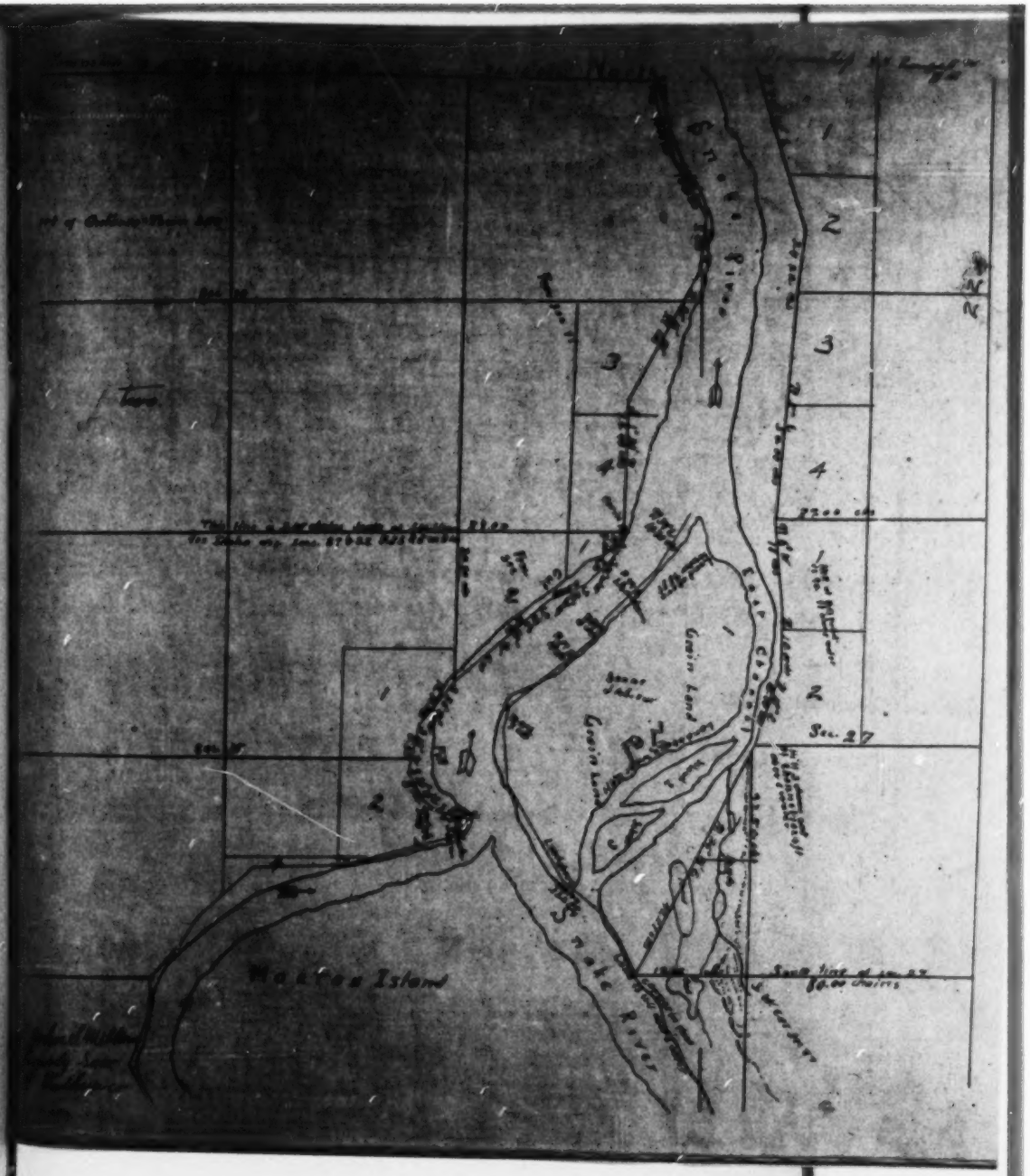
FRANK HERRON
to
A. B. MOSS & BRO.

This indenture, Made the Twenty-seventh day of May, in the year of our Lord One Thousand Eight Hundred and Ninety-two Between Frank Herron, the party of the first part, and A. B. Moss and F. C. Moss, known as the firm of A. B. Moss & Brother, the parties of the second part,

Witnesseth: That the said party of the first part, for and in consideration of the sum of Three Hundred Dollars, lawful money of the United States of America, to me in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey unto the said party of the second part, and to their heirs and assigns forever, the following described land as follows, to wit: The Lots numbered One and Two of Section Twenty-seven and the Lots numbered Three and Four of Section Twenty-two in Township Eight North, of Range Five West of Boise Meridian in Idaho, containing One Hundred and Twenty Five acres and Twenty hundredths of an acre,

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the rents, issues and profits thereof.

To Have and To Hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said parties of the second part, and to their heirs and assigns forever, and the said party of the first part, and his heirs, the said premises in the quiet and peaceable possession of the said parties of the second part, and their heirs and assigns, against the said party of the first part, and his heirs, and against all and every person or persons


Sec. 27
Walden Island
Snake River

whomsoever, lawfully claiming or to claim the same, shall and will Warrant, and by these presents forever Defend.

In witness whereof, the said party of the first part has hereunto set his hand and seal, the day and year first above written.

FRANK HERRON. [SEAL.]

Signed, Sealed and Delivered in the Presence of

C. S. LOVELAND.

STATE OF IDAHO,
County of Ada, ss:

On this Twenty-seventh day of May in the year 1892, before me, C. S. Loveland, a Notary Public in and for said County, personally appeared Frank Herron, known to me to be the person whose name is subscribed to the annexed instrument, and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my notarial seal, the day and year in this certificate first above written.

[SEAL.]

C. S. LOVELAND,
Notary Public.

Recorded at request of A. B. Moss & Bro., June 13, 1892, at 8:20 A. M.

SHERMAN G. KING, *Recorder,*
By JAS. H. MORGAN, *Deputy.*

Book 21, Deeds, Page 499.

(Here follow diagrams marked Exhibit "E" and Exhibit "G.")

STATE OF IDAHO,
County of Ada, ss:

This is to certify that we have been duly and regularly served with the foregoing motion now pending on writ of error in the Supreme Court of the United States, wherein A. B. Moss and Bro. are plaintiffs in error and A. H. Ramey is defendant in error; that we have carefully read all of the foregoing exhibits for which a certiorari is asked for diminution of the record under Rule 14 of the rules of the above entitled court; and to save the time, expense and delay of certifying to the above court the matters referred to in the foregoing motion, and knowing that the Exhibit "A" is a true and correct copy of the decision of the Supreme Court of Idaho in the above entitled cause, rendered on the 23rd day of March, 1908, and that the Exhibits "B-G," above set out, were offered in evidence in the trial of the above cause and are true and correct copies of the documentary evidence admitted in the said cause, we hereby admit the accuracy and truthfulness of the same and waive a formal order by this court directing the certification as prayed for in the foregoing motion.

OLIVER O. HAGA,
RICHARDS & HAGA,
McKEEN F. MORROW,
Attorneys for Plaintiffs in Error.
WILL R. KING,
Attorney for Defendant in Error.

[Endorsed:] In the Supreme Court of the United States. A. B. Moss and Frank C. Moss, Plaintiffs in Error, v. A. H. Ramey, Defendant in Error. Motion—Certiorari, Diminution of Record, under Rule 14. Will R. King, Attorney for Defendant in Error.

[Endorsed:] File No. 24,036. Supreme Court U. S. October term, 1915. Term No. 61. Albert B. Moss et al., co-partners, etc., Pl'ffs in Error, vs. Alfred H. Ramey. Motion for writ of certiorari, exhibits thereto, and stipulation of counsel as to same. Filed December 9, 1915.

No. [redacted] 61

THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1914

ALBERT B. MOSS and FRANK C. MOSS, Copartners under the firm name and style of A. B. MOSS & BRO., Plaintiffs in Error,

vs.

ALFRED H. RAMEY, Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO

JAMES H. RICHARDS,
OLIVER O. HAGA,
McKEEN F. MORROW,
Attorneys for Plaintiffs in Error.

No. 346.

THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1914

ALBERT B. MOSS and FRANK C. MOSS, Copartners under the firm name and style of A. B. MOSS & BRO., Plaintiffs in Error,

vs.

ALFRED H. RAMEY, Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO

JAMES H. RICHARDS,
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McKEEN F. MORROW,
Attorneys for Plaintiffs in Error.

INDEX.

THE SUPREME COURT

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ALBERT B. MOSS and FRANK C. MOSS, Copartners under the firm name and style of A. B. MOSS & BRO., Plaintiffs in Error,

vs.

ALFRED H. RAMEY, Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO

STATEMENT OF THE CASE.

This action was commenced by plaintiffs in error, on February 23, 1905, to quiet their title to certain lands not shown on the official plats of the government survey, but lying between the center line of the main channel of Snake river and the westerly meander line of lots 3 and 4 of Section 22, lots 1 and 2 of Section 27, lots 1 and 2 of Section 28, and lot 1 of Section 33, all in

Township 8 North, Range 5 West, B. M., Canyon County, Idaho, which lots were granted by United States patents issued in 1889 and 1892, respectively, to the predecessors of plaintiffs in error (Trans. pp. 3, 4, 9). The cause was tried and a decree rendered against plaintiffs in error.

An appeal was taken to the Supreme Court of Idaho which on March 23, 1908, reversed the trial court, holding that the legal title to the land in controversy under the United States patents granting the above described lots was in plaintiffs in error as riparian owners, and ordered that "Inasmuch as the court's findings were made upon a wrong theory of the law, we deem it only just to all parties to grant a new trial in order that the court may determine whether the plaintiffs' title has been divested or right of action arrested by adverse possession of the defendant. The judgment will be reversed and a new trial ordered with leave to either party to amend their pleadings." A. B. Moss & Bro. vs. Ramey, 14 Ida. 598, 606; 95 Pac. 513. (See p. 60, Trans.)

No attempt was made to review such decision by writ of error from this court, but the case went back to the trial court, where defendant in error amended his answer pursuant to the suggestion of the Supreme Court and eliminated therefrom the question of the passing of title to said land from the United States under its patent to the riparian proprietors, thereby presenting for determination upon the second trial the sole question of adverse possession. (Trans. pp. 5, 6, 60 and 61). The second trial was had on the issue of adverse possession only, and that issue was found in favor of the plaintiffs in error by the trial court, and decree was rendered in their favor on May 1, 1911. (Trans. pp. 8-12).

Motion for a new trial was made, (Trans. p. 12) and eventually overruled on April 12, 1912 (Trans. p. 55), and an appeal to the Supreme Court of the State was taken from the order overruling such motion and from the judgment (Trans. p. 56). On such appeal but one issue could come before the appellate court, and that was the issue of adverse possession. The cause was argued on appeal on January 23, 1913, but on February 26, 1913, after the decision of this court in the case of Scott vs. Lattig, 227 U. S. 220, 57 L. Ed. 490, the court ordered a reargument (Trans. p. 58). The case was reargued on May 5, 1913 (Trans. p. 58). A decision was rendered on May 17, 1913, reversing the trial court and remanding the cause for a new trial. In this decision (25 Ida. 1, 136 Pac. 608, Trans. pp. 60 to 63) the majority of the court refers to the decision of this court in Scott vs. Lattig, *supra*, and states that it is "in some measure contrary to the views entertained and expressed by this court in Johnson vs. Johnson, 14 Ida. 561, on the authority of which the case of A. B. Moss & Bro. v. Ramey was decided." The court then goes on to hold that the doctrine of law of the case could not be invoked (Trans. p. 61), saying: "Where this court is not the court of final resort in the determination of the question presented and a writ of error may be taken to the Supreme Court of the United States, and such a writ is prosecuted and that court expresses a different view as to the law applicable to a given state of facts from that entertained by this court, it is our duty on a subsequent appeal in another case involving the same federal question, to reconsider the question previously determined and render our judgment in conformity with what we understand to be the rule announced by the court of last resort on such question."

The reasons given by the court, however, do not apply to either the law or the facts in this case, but the court nevertheless reversed not only the judgment which it had itself rendered on the former appeal, more than five years before, but also the judgment of the trial court on the second trial, and remanded the case for a new trial "on all the issues presented in the original complaint or that the parties may see fit to present by amended pleadings," at the same time reaffirming the rule that riparian owners on meandered streams in Idaho take title to the center of the stream.

A petition for rehearing was filed by plaintiffs in error and a rehearing granted and the cause again argued and on November 26, 1913, the court again rendered its decision (Trans. pp. 63-65) changing its last previous decision to the extent that it did not order a new trial, but it remanded the case to the trial court with directions to dismiss the action.

From this last decision the present writ of error is prosecuted. The Supreme Court of the State assumed, as stated before, that the question involved in this case was conclusively determined by this court in Scott v. Lattig, *supra*. It will be noted that in neither the decision of May 17th, 1913, nor the decision on rehearing of November 26th, 1913, was the question of adverse possession, the only issue arising under the pleadings and the evidence of the case, discused, but the court considered on this record the question that it had finally disposed of in its decision in 1908 after which the pleadings were amended so as to eliminate that issue, and the cause retried upon the one issue of adverse possession. The testimony in the transcript, briefly stated, shows that

patents from the United States were issued to Roswell Clement in 1889 for some of the mainland lots here involved, and to Frank Herron in April, 1892, for the remainder of these lots, and that in 1892 the mainland lots above referred to with all their appurtenances, were conveyed to plaintiffs in error by warranty deed (Trans. pp. 9 and 13).

The government's official plats of the survey, according to which the mainland lots were entered and conveyed as aforesaid, show the mainland lots to extend to Snake river and that beyond the river lies the State of Oregon. In other words, no land whatever is shown as lying between the meander line of the lots conveyed to plaintiffs in error and Snake river. Title to the lots above described was, therefore, acquired from the government under an official plat showing that they bordered upon the main channel of the river. The testimony shows, however, that between the meander line as actually surveyed and located on the ground and the main channel of Snake river there lies a strip of land which has not been surveyed but which is cut up by secondary channels and sloughs. These secondary channels and sloughs carry water during high stages of water in the river, but are entirely dry during the low stages of the river, except in some places where there may be small ponds or pools of standing water (Trans. pp. 15, 18, 20 and 23).

The land between the high water channel and the main channel of Snake river is generally referred to in the record as an island. It was originally covered with willows and rose bushes, and it is subject to overflow in high water to such an extent that during the period when the defendant in error attempted to occupy the island he moved off onto the

mair land in the spring of the year during high water, and on this account he moved off permanently in 1899 and has not lived on the island since that time (Trans. pp. 30, 45).

In view of the fact that the only issue in this case in the trial court was one of adverse possession, the evidence is limited largely to that question. It appears from the record that defendant in error went upon this island about 1894 as a squatter, believing it to be government land (Trans. pp. 30-32). He had no intention of depriving plaintiffs in error of their property (Trans. pp. 30, 31). From 1894 to 1899 he lived mostly on the island, except during high water, and since he first went there he has maintained at most a mixed and scrambling possession with plaintiffs in error. The latter have pastured their stock on it at will during all this period. The so-called fences being no obstacle whatever to the cattle going from the mainland on to the island at will (Trans. pp. 38, 41, 42-46).

In view of the unexpected decision of the Supreme Court of the State disposing of the case on the ground that it was a part of the unsurveyed public domain and that plaintiffs in error were in effect limited to the mainland and acquired no title, right or interest to the land beyond the meander line under the patents from the United States to their predecessors in interest, we are forced to present the question as to the status of this land without having the benefit of a record prepared with that question in view, but rather for the purpose of proving or disproving title by adverse possession—that being the only issue under the pleadings.

This cause, therefore, has been argued before the Supreme Court of Idaho on four occasions and that

court has rendered three opinions in the case, the first in 1908, the second on May 17th, 1913, and the last on November 26th, 1913; and the trial court has heard the cause twice. In the first decision the trial court held that the land in dispute was part of the unsurveyed public domain. That decision was reversed by the Supreme Court (Moss v. Ramey, 14 Ida. 598, 95 Pac. 513), and the case sent back for retrial upon the issue of adverse possession.

As stated before, the pleadings were amended so as to eliminate the question whether the land was part of the public domain, and the defendant in error claiming title by adverse possession, deraigned title through the same source as plaintiffs in error, the cause upon that issue was determined in favor of plaintffs in error, and from that decision defendant in error appealed to the Supreme Court of the State, which expressed no opinion on the question of adverse possession, but set aside the decision which it had rendered in 1908 and which had become the final judgment in the case as to the question of whether the land was part of the public domain, and directed that the action be dismissed, saying that that was the only judgment which it could enter in view of the decision of this court in Scott v. Lattig, *supra.*

SPECIFICATION OF ERRORS.

The errors assigned upon the application for the writ are set out in full in the printed record, pages 67 to 69, and for a particular statement thereof we beg to refer to such record. Briefly stated they are:

1. That the Supreme Court of Idaho erred in adjudging and deciding that plaintiffs in error did not have a better or superior title or right to the pos-

session of the land between the meander line and the main channel of Snake river than the defendant in error.

2. That the Supreme Court of Idaho erred in holding, adjudging and deciding that Roswell P. Clement and Frank Herron, under their respective patents from the United States government to lots 1 and 2 of Section 28, lot 1 of Section 33, lots 1 and 2 of Section 27, lots 3 and 4 of Section 22, Twp. 8 N. R., 5 W. B. M., obtained no right to the use, occupation or possession of the land lying between the meander line of said lots and the main channel of Snake river.

3. That the Supreme Court erred in holding, adjudging and deciding that the meander line of the United States government survey, along the west side of the lots described above, is a line of boundary, and that the patents from the United States to the predecessors in interest of plaintiffs in error, who entered and acquired title to said lots under the public land laws of the United States, conveyed no right, title or interest to such patentees to the unsurveyed land lying between such meander line and the main channel of Snake river.

4. That the judgment and decision of said Supreme Court is repugnant to and in conflict with the fourteenth amendment to the Constitution of the United States in that it deprives plaintiffs in error of their property without due process of law, particularly in this, that the decision of said Supreme Court in 1908 on the first appeal in said cause had become final and binding upon the parties and was the law of the case and upon the subsequent trial of the case in the trial court the pleadings were amended to conform to said decision and evidence was in-

troduced exclusively upon the question of adverse possession, and said court was without power or authority upon the second appeal based upon a different record, to reverse the judgment which had been entered pursuant to the decision on the former appeal.

5. That the said Supreme Court erred in not affirming the judgment or decree entered by the trial court in said cause.

BRIEF OF THE ARGUMENT.

Whenever the question in any court, state or federal, is whether the title to land which has once been the property of the United States has passed from the Federal Government, that question must be resolved by the laws of the United States.

Wilcox vs. Jackson, 13 Pet. 498-517; 10 L. ed. 264-73.

Irvine vs. Marshall, 20 How. 558; 15 L. ed. 994.

Gibson vs. Choteau, 13 Wall 92; 20 L. ed. 534.

When land patented by the United States Government under the public land laws is shown by the official plat of the survey as bordering on a fresh water river, the body of water whose margin is meandered is the true boundary and not the meander line.

Hardin vs. Jordan, 140 U. S. 371, 380; 35 L. ed. 428-433.

St. Clair Co. vs. Lovingston, 90 U. S. 46, 23 L. ed. 59.

Mitchell vs. Smale, 140 U. S. 406; 35 L. ed. 442.

St. Paul & P. R. R. Co. vs. Schurmeier, 74 U. S. 272; 19 L. ed. 74.

Jefferis vs. East Omaha Land Co., 134 U. S. 178; 33 L. ed. 872.
Middleton vs. Pritchard, 4 Ill. 514.
Houck vs. Yates, 82 Ill. 179.
Fuller vs. Dauphin, 124 Ill. 542.
Knudson vs. Omason (Utah), 27 Pac. 250.

One of the important rights of a riparian owner is access to the navigable part of a river from the front of his land.

St. Louis vs. Rutz, 138 U. S. 226; 34 L. ed. 941, 949.
Dutton vs. Strong, 66 U. S. 23; 17 L. ed. 29.
St. Paul & P. R. R. Co. vs. Schurmeier, 74 U. S. 272; 19 L. ed. 174.
Yates vs. Milwaukee, 77 U. S. 497; 19 L. ed. 984, 986.

When land is bounded by a river, the water is appurtenant to the land and constitutes one of the advantages of its situation, and a material part of its value, and enters largely into the consideration for acquiring it, and for the government to later survey and dispose of the strips of land that were left between the meander line and the body of water purporting to have been meandered, is an injustice to the original entryman or patentee who acquired the meandered lots under the belief that they extended to the river or other body of water, and a resurvey and sale of such land should not be permitted except in case of fraud or palpable mistake in the original survey.

Mitchell vs. Smale, 140 U. S. 406; 35 L. ed. 442.
Lamprey vs. State, 52 Minn. 181.

Hardin vs. Jordan, 140 U. S. 371; 35 L. ed. 428.

Knudson vs. Omason, 10 Utah, 124; 37 Pac. 250.

Grand Rapids, etc., R. R. Co. vs. Butler, 159 U. S. 87; 40 L. ed. 85.

Chandos vs. Mack, 77 Wis. 573; 10 L. R. A. 207.

Except in cases of omission by accident, fraud or palpable mistake, the United States has no authority to make surveys, subsequent to patent to the upland, of any land between the meander line and the body of water purporting to have been meandered in the original survey.

St. Paul & P. R. Co. vs. Schurmeier, 7 Wall. 272, 289; 19 L. ed. 74.

Hardin vs. Jordan, 140 U. S. 371, 383; 35 L. ed. 428, 433.

Mitchell vs. Smale, 140 U. S. 406, 412, 413; 35 L. ed. 442, 444, 445.

Moore vs. Robbins, 96 U. S. 530, 533; 24 L. ed. 848, 850.

Franzini vs. Layland, 120 Wis. 72; 97 N. W. 499.

Davis vs. Wiebold, 139 U. S. 507; 35 L. ed. 238.

Grand Rapids & I. R. Co. vs. Butler, 159 U. S. 87; 40 L. ed. 85.

St. Louis Smelting & Ref. Co. vs. Kemp, 104 U. S. 636, 646; 26 L. ed. 875, 878.

Lindsey vs. Hawkes, 2 Black, 554, 560, 561; 17 L. ed. 265, 268.

Cragin vs. Powell, 128 U. S. 691; 32 L. ed. 566.

Webber vs. Pere Marquette Boom Co., 62 Mich. 635; 30 N. W. 469.
Shufelt vs. Spaulding, 37 Wis. 662.
State vs. Lake St. Clair Fishing & Shooting Club, 127 Mich. 587; 87 N. W. 117.

Where the government has never complained of either fraud or mistake in the original survey, a squatter on land between the meander line and the water cannot be heard to complain that the government has parted with title to a larger acreage than it received pay for, and as between such squatter and the riparian owner, the latter has the better title.

Whitaker vs. McBride, 197 U. S. 510; 49 L. ed. 857.

Where a survey and patent show a river to be one of the boundaries of the tract, it is a legal deduction that there is no vacant land left for appropriation between the river and the river boundary of such tract.

St. Clair Co. vs. Lovingston, 90 U. S. 46, 23 L. ed. 59.
Churchill vs. Grundy, 5 Dana 100.
Jefferis vs. East Omaha Land Co., 134 U. S. 190.
St. Louis vs. Rutz, 138 U. S. 243.
Ross vs. Faust, 54 Ind. 475; 23 Am. Rep. 658.
Turner vs. Parker, 14 Ore. 341; 12 Pac. 496.

Where surveys have been made and lands entered in reliance upon the decisions of this court that the riparian owner took to the water purporting to have been meandered, such decisions will be held to constitute rules of property, and the riparian owner will be protected accordingly.

Material allegations of the complaint not denied by the answer are deemed admitted, and such admissions are conclusive on appeal.

Sec. 4217, Idaho Revised Codes.

Broadbent vs. Brumback, 2 Ida. 366; 16 Pac. 555.

Knowles vs. New Sweden Irrigation Dist., 16 Ida. 217; 101 Pac. 81, 87.

2 Ency. of Law and Practice, 179; 3 C. J. 735.

Texas-Pacific Ry. Co. vs. Abeline Cotton Oil Co., 204 U. S. 426; 51 L. ed. 553.

Eakin vs. Frank, 21 Mont. 192; 53 Pac. 538.

The claim that the land in controversy was still part of the public domain was not raised in the trial court on the second trial, and the Supreme Court of Idaho had no power to reverse that court and determine that it was public land and that title had not passed to plaintiffs in error.

Secs. 3817 and 4824, Idaho Revised Codes.

Lamkin vs. Sterling, 1 Ida. 120, 123.

Miller vs. Donovan, 11 Ida. 545; 83 Pac. 608.

Medbury vs. Maloney, 12 Ida. 634; 88 Pac. 81.

Marysville, etc., vs. Home Insurance Co., 21 Ida. 377; 121 Pac. 1025.

Pomeroy vs. Gordan, 25 Ida. 279; 137 Pac. 888.

The action of the Supreme Court in going entirely outside the record to determine that the land in controversy was public land and that title had not passed to plaintiffs in error was a denial of the equal protection of the laws and of due process of law.

5 Ency. U. S. Sup. Ct. Rep., p. 618, and cases cited.

Where a question necessary for the determination of a case has been presented to and decided by an appellate court, such decision becomes the law of the case in all subsequent proceedings in the same action and is a final adjudication, from the consequences of which the court cannot depart nor the parties relieve themselves.

Westerfield vs. New York Life Ins. Co., 157 Cal. 339; 107 Pac. 699.

Lindsay vs. People, 1 Ida. 438.

Hall vs. Blackman, 9 Ida. 555; 75 Pac. 608

Hunter vs. Porter, 10 Ida. 86; 77 Pac. 439.

Steve vs. Bonners Ferry Lumber Co., 13 Ida. 384, 394; 92 Pac. 363.

Gerber vs. Nampa, etc., Irrigation District, 19 Ida. 765; 116 Pac. 104.

City of Nampa vs. Nampa & Meridian Irrigation Dist., 23 Ida. 422; 131 Pac. 8.

Himely vs. Rose, 5 Cranch 313; 3 L. ed. 112.

Skillern's Execut. vs. May's Execut., 6 Cranch 267; 3 L. ed. 220.

Martin vs. Hunter, 1 Wheat. 374; 4 L. ed. 97.

Browder vs. McArthur, 7 Wheat. 55; 5 L. ed. 397.

The Santa Maria, 10 Wheat. 430; 6 L. ed. 359.

Sibbald vs. U. S., 12 Pet. 488; 9 L. ed. 1167.

Washington Bridge Co. vs. Stewart, 3 How. 411; 14 L. ed. 658.

Sizer vs. Many, 16 How. 98; 14 L. ed. 863.

Roberts vs. Cooper, 20 How. 467; 15 L. ed. 969.

Cook vs. Burnley's Execut., 76 U. S. 672; 20 L. ed. 84.

Magwire vs. Tyler (Tyler vs. Magwire), 17 Wall. 253, 294; 21 L. ed. 576.
Board of Supervisors vs. Kennicott, 94 U. S. 498; 24 L. ed. 260.
Pearce vs. Germania Ins. Co. (The Lady Pike), 96 U. S. 461; 24 L. ed. 672.
Ames vs. Quimby, 106 U. S. 342; 27 L. ed. 100.
Clark vs. Keith, 106 U. S. 464; 27 L. ed. 302.
Chaffin vs. Taylor, 116 U. S. 567; 29 L. ed. 727.
Barney vs. Winona, etc., Ry. Co., 117 U. S. 231; 29 L. ed. 858.
Gaines vs. Caldwell (Gaines vs. Rugg), 148 U. S. 228; 37 L. ed. 432.
Re Sanford Fork & Tool Co., 160 U. S. 247; 40 L. ed. 414.
Great Western Teleg. Co. vs. Burnham, 162 U. S. 339; 40 L. ed. 991.
Thompson vs. Maxwell Land Grant Co., 168 U. S. 456; 42 L. ed. 539.
Illinois ex rel. Hunt vs. Illinois Central Ry. Co., 184 U. S. 77; 46 L. ed. 440.
United States vs. Camou, 184 U. S. 572; 46 L. ed. 694.
Mutual Life Ins. Co. vs. Hill, 193 U. S. 551; 48 L. ed. 788.
Richardson vs. Ainsa, 218 U. S. 289; 54 L. ed. 1044.
Balch vs. Haas (C. C. A.), 73 Fed. 974.
Hailey vs. Kirkpatrick, 104 Fed. 647.
Montana Min. Co. vs. St. Louis Min. Co. (C. C. A. 9th), 147 Fed. 897.
Tænzer & Co. vs. C., R. I. & P. Ry. Co., 191 Fed. 543.

This rule applies regardless of whether the previous decision is right or wrong and is a limitation on the court's power and not a mere rule of practice.

Washington Bridge Co. vs. Stewart, 3 How. 413; 11 L. ed. 658.

Chaffin vs. Taylor, 116 U. S. 567; 29 L. ed. 727.

Sibbald vs. United States, 12 Pet. 488; 9 L. ed. 1167, 1169.

Gaines vs. Caldwell, 148 U. S. 228; 37 L. ed. 432.

Magwire vs. Tyler, 17 Wall. 253; 21 L. ed. 576.

Illinois ex rel. Hunt vs. Illinois Central Ry. Co., 184 U. S. 77; 46 L. ed. 440.

United States vs. Camou, 184 U. S. 572; 46 L. ed. 694.

Hunter vs. Porter, 10 Ida. 86.

Leese vs. Clark, 20 Cal. 388, 416.

The cases from this court relied upon by the Supreme Court of Idaho to justify its departure from the rule of law of the case do not sustain its action.

United States vs. D. & R. G. Ry. Co., 191 U. S. 83; 48 L. ed. 106.

Zeckendorf vs. Steinfeld, 225 U. S. 445; 56 L. ed. 1156.

Messinger vs. Anderson, 225 U. S. 436; 56 L. ed. 1152.

Chesapeake & Ohio Ry. Co. vs. McCabe, 213 U. S. 207; 53 L. ed. 765.

King vs. West Virginia, 216 U. S. 92; 54 L. ed. 396.

Remington vs. Central Pacific Ry. Co., 198 U. S. 95; 49 L. ed. 959.

Great Western Teleg. Co. vs. Burnham, 162 U. S. 339; 40 L. ed. 991.
Northern Pacific Ry. Co. vs. Ellis, 144 U. S. 458; 36 L. ed. 504.
Magwire vs. Tyler, supra.

The rule of law of the case applies to intermediate appellate courts and to the highest courts of a state where federal questions are involved, and if, pending a second appeal, the rule of law on which such a decision was based is changed by a higher court, the lower court has no power to reverse or modify its original decree.

Silva vs. Pickard, 14 Utah 245; 47 Pac. 144.
District of Columbia vs. Brewer, 32 App. D. C. 388.
Ogle vs. Turpin, 8 Ill. App. 453.
Herr vs. Graden (Colo.), 127 Pac. 319.
Bank of Commerce vs. State, 96 Tenn. 591; 36 S. W. 719.

Under the laws of Idaho, the remittitur from the Supreme Court went down twenty days after the decision on the first appeal (March 23, 1908), and as such decision construed a Federal grant and determined the rights of plaintiffs in error to the land in controversy, the judgment of that court became final upon the expiration of the two years allowed for issuance of writ of error from this Court, and the Idaho Supreme Court was without power on a subsequent appeal five years later to reverse such judgment, and its action in doing so impairs a vested right under such Federal grant.

Sec. 3818, Idaho Rev. Codes.
Rules 60 and 61, Supreme Court of Idaho.
Moss vs. Ramey, 14 Idaho 598, 25 Ida. 1.

The findings of the trial court on the issue of adverse possession were conclusive both on this court and the state Supreme Court, and the Federal questions in this case being decisive of the whole controversy, this court, if it finds the decision of the state court on such questions erroneous, should order the affirmance of the decision of the trial court.

Waters-Pierce Oil Co. vs. Texas, 212 U. S. 86; 53 L. ed. 417.

Robertson vs. Moore, 10 Ida. 115; 77 Pac. 218.

Mellen vs. Great Western Beet Sugar Co., 21 Ida. 353, 363; 122 Pac. 30.

Weeter Lumber Co. vs. Fales, 20 Ida. 255; 118 Pac. 289.

Miller vs. Blunck, 24 Ida. 234; 133 Pac. 383.

Murdock vs. Memphis, 20 Wall. 590, 642; 22 L. ed. 429.

Fairfax vs. Hunter, 7 Cranch 603, 628; 3 L. ed. 453, 461.

Martin vs. Hunter, 1 Wheat. 304, 323, 362; 4 L. ed. 97, 102, 111.

Magwire vs. Tyler, 17 Wall. 253, 293; 21 L. ed. 576, 585, 587.

Stanley vs. Schwalby, 162 U. S. 255, 283; 40 L. ed. 960.

ARGUMENT.

The Supreme Court of Idaho on the first appeal in this case (Moss v. Ramey, 14 Idaho 598), held that the title to the land in controversy had passed from the United States to the predecessors in interest of A. B. Moss and brother under patent to the fractional upland lots bordering the river and lying along and adjacent to the land here in dispute. The opinion in the case was rendered at the same time as the

opinion in Johnson v. Johnson, 14 Idaho 561. The two cases were considered together but the main opinion was written in the Johnson case, and the Idaho court there held, quoting from the syllabus prepared by the court:

> "Where the government grants land bordering upon a navigable stream, that is, a fresh water stream, not affected by the ebb and flow of the tide, and there is nothing in the grant or in the acts of the government which indicates an intention upon the part of the government to make any reservation or limit the grant to the water's edge, the grantee takes to the middle of the main channel of such stream.
>
> "In this state, the doctrine is announced and adopted, that a riparian owner upon the streams of this state, both navigable and non-navigable, takes to the thread of the stream, subject, however, to an easement for the use of the public."

On the first appeal in the case at bar, the court sustained the contentions of the plaintiffs in error and reversed the judgment of the trial court, saying:

> "This case was tried and decided by the trial court upon the theory that the land in controversy was unsurveyed government land, but this court finds that the legal title was in the riparian owner."

The defendant in error, on the former appeal, also contended that he had acquired title by adverse possession, but upon that issue the trial court had not made sufficient findings for it had found that the land was part of the unsurveyed public domain, and referring to that feature of the case, the court said (14 Idaho 606):

> "What finding the court would have made upon the question of adverse possession, had such court

> determined that the legal title was in the riparian owner, this court is unable to say. For the reasons stated in the opinion of Johnson v. Johnson, *supra*, this case must be reversed; and, inasmuch as the court's findings were made upon a wrong theory of the law, we deem it only just to all parties to grant a new trial in order that the court may determine whether plaintiff's title has been divested or right of action arrested by adverse possession of the defendant. The judgment will be reversed, and a new trial ordered with leave to either party to amend their pleadings."

The case was accordingly remanded to the trial court. The defendant amended his pleadings so as to set up a claim of title by adverse possession and a trial was thereupon had upon that issue which was later decided in favor of plaintiffs in error. The defendant in error thereupon appealed to the Supreme Court of the State and while the case was pending before that court, on the question of adverse possession, this court rendered its opinion in Scott v. Lattig, 227 U. S. 229, 57 L. Ed. 490, and the Supreme Court of the State erroneously assumed that all the decisions of that court relative to land lying beyond the meander line were erroneous and would have to be set aside, and it accordingly reversed the trial court in this case, not because of any error appearing in the record but because the court believed that according to the doctrine of Scott v. Lattig, the decision in Moss v. Ramey, rendered in 1908, was erroneous. It first ordered that the case should be remanded to the trial court with leave to the parties to again amend their pleadings so as to bring up the question which had been finally determined in the first appeal, saying:

"In remanding this case, we think it proper to suggest to the parties and to the trial court that it is not the purpose of this court to in any way recede from the rule heretofore announced to the effect that a riparian owner in this state on a meandered stream or body of water, whether navigable or non-navigable, takes title to the center or thread of the stream. * * * On the other hand, it is the equally well fixed purpose of the court to follow the views expressed by the Supreme Court of the United States in Scott v. Lattig, in reference to such islands or tracts of land as may fall within the purview of that decision, wherein it may appear that title has not passed from the government to any patentee." (Trans. p. 62).

On re-hearing, the court changed its view as to remanding the case, saying:

"Plaintiffs base their title to said island upon the fact that they are riparian owners opposite said island, and if this case is remanded to the trial court for a new trial, that court, under the decision of the Scott-Lattig case, must hold against the plaintiffs in this action. Their right to have the title quieted in them depends upon whether the island passed with the mainland under or by virtue of the United States patent issued to their predecessors in interest. That is clearly a federal question and is decided decisively against them under the rule laid down in the Scott-Lattig case. * * * Under the decision of the Scott-Lattig case, the plaintiffs cannot establish their title to said land. That being true, they could not have their title quieted in this action. * * * It would, therefore, be a useless act to remand the case for a new trial, as directed by this court in the opinion on the original hearing of this case." (Trans. p. 64).

And it was, therefore, ordered that the case be remanded to the trial court with directions to enter judgment, dismissing the action. It is clear that the Supreme Court of the State misconstrued the decision of this court in Scott v. Lattig, *supra*, and unwillingly applied it to the case at bar on the erroneous assumption that it was controlling. The two cases are governed by entirely different principles of law. In the Scott-Lattig case, the opinion and the record show that the island there in question had been surveyed by the government and Scott had entered it under the public land laws; that the island was entirely surrounded by two large channels of the river, both carrying a large volume of water at all seasons of the year, the smaller channel being approximately three hundred feet in width and having a fall of about six feet from the upper end of the island to the lower end; that it was "fast dry land," not subject to overflow, even during the highest stages of the river. The riparian owner in that case was not deprived of his river frontage but had access to a channel about three hundred feet in width and carrying a large volume of fresh running water during all stages of the river.

In the case at bar, the government has made no claim to the island. It has not been surveyed and it has not been entered under the public land laws by the defendant in error or anyone. It is not separated from the mainland by a channel of the river carrying fresh running water except during the higher stages of water in the river. During the low water season, the channel is dry except in places where there may be pools of standing water, and the island itself is subect to overflow during periods of high water. (Trans. pp. 15, 30). Should the plaintiffs in error

be deprived of the land in dispute, they will also be deprived of access to running water except during periods of high water. Their land instead of bordering upon the river, will border upon sloughs and dry channels containing pools of stagnant water except during the higher stages of the river. The differences in the physical characteristics and conditions of the island and channels involved, as well as the fact that the government had in the Scott case surveyed the island and Scott had entered it under the public land laws, bring into operation legal principles fundamentally different, and the decision of this court in Scott v. Lattig is not only not controlling but it rather supports the title of plaintiffs in error. This case is controlled by the principles that were followed by this court in Hardin v. Jordan, 140 U. S. 371; Grand Rapids, etc., Railroad Co. v. Butler, 159 U. S. 87; 40 L. Ed. 85; St. Paul & P. R. R. Co. v. Schurmeier, 7 Wall 272; 19 L. Ed. 74; Whittaker v. McBride, 197 U. S. 510; 49 L. Ed. 857; Middleton v. Pritchard, 4 Ill. 510, and similar cases.

In St. Paul & P. R. R. Co. v. Schurmeier, the government had claimed the island and caused it to be surveyed; hence, it was a stronger case for the defendant in error than this. The court said:

> "Appellants contend that the river is not a boundary in the official survey; that the tract, as surveyed, did not extend to the river, but that the survey stopped at the meander posts and the described trees on the bank of the river. Accordingly, they insisted that lot 1 did not extend to the river, but only to the points where the township and section lines intersected the left bank of the river, as shown by the meander posts. * * *
>
> "Conceded fact is, that those field notes constitute the foundation of the official plat, and that

that plat was the only one in the local land office at the time the patent was issued under which the appellee claims. When the water in the river was at a medium height, there was a current in the channel, between what is called the island and the bank where the meander posts were located, but when the water was low, there was no current in that channel and, when the water was very high in the river, the entire parcel of land designated as the island, was completely inundated."

The court will note the similarity between the physical conditions of the island there involved and the one now before the court. The court further said:

"No mention is made of any such channel in the official survey, under which the patent was issued; but the deputy surveyor, under the instructions of the land office, on the 13th of March, 1856, made a new survey of the parcel of land lying between that channel and the main channel of the river, and the field notes of the same were subsequently approved by the Surveyor General. * * * Besides, the uncontradicted fact is, that the landing for boats and vessels touching at that port, was also on the river side of the island, and the finding of the referee shows that the front wall of the complainant's warehouse is not more than four feet north of the southerly line of the lot on which it is erected."

After discussing the facts at some length, the court says:

"The expressed decision of the Supreme Court of the State was that the river, in this case, and not the meander line, is the west boundary of the lot, and in that conclusion of the state court, we entirely concur." (Our italics).

The same may be said of the decision of the Idaho Supreme Court on the first appeal, both in this case and in the case of Johnson v. Johnson, *supra.* The court in the Schurmeier case further said:

> "Meander lines are run in surveying fractional portions of the public land bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining sinuosities of the banks of the stream and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser.
>
> "*In preparing the official plat from the field notes, the meander line is represented as the border line of the stream and shows to a demonstration that the water course, and not the meander line, as actually run on the land, is the boundary.*" (Our italics).

Again, we submit that the facts which seem to have controlled the decision there are all present in the case at bar. The court after discussing the rule governing navigable non-tidal streams and referring to riparian owners along streams that are navigable in fact but in which the tide does not ebb and flow, says:

> "Although such riparian proprietors are limited to the stream, still they also have the same right to construct suitable landings and wharves, for the convenience of commerce and navigation, as is accorded to riparian proprietors bordering on navigable waters affected by the ebb and flow of the tide."

In Hardin v. Jordan, 140 U. S. 371, the Land Department had surveyed land between the meander line and the water's edge. Hence, the case again was stronger than the case of the defendant in er-

ror. The court after referring to the original plats under which patent had been issued to the riparian owner, says:

> "The patent itself does not contain all the particulars of the survey, but the grant of the lands is recited to be according to the official plat of the survey of said lands, returned to the General Land Office by the Surveyor General, thereby adopting the plat as a part of the instrument.
>
> "Such being the form of the title granted by the United States to the plaintiffs' ancestor, the question is as to the effect of that title in reference to the lake and the bed of the lake in front of the lands actually described in the grant. * * * It has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines. *It has frequently been held, both by the Federal and State courts, that such meander lines are intended for the purpose of bounding the abutting lands granted upon the waters whose margins are thus meandered; and that the waters themselves constitute the real boundary.*" (Our italics).

The court cites many cases in support of the proposition stated, and it quotes with approval from the Supreme Court of Illinois in Middleton v. Pritchard, 4 Ill. 510, as follows:

> "Where the government has not reserved any right or interest that might pass by the grant nor done any act showing an intention of reservation

> such as platting or surveying, we must construe its grant most favorably for the grantee, and that it intended all that might pass by it. * * *."

Hardin v. Jordan, *supra*, has been cited with authority on so many occasions by this court and by other Federal and State courts that it would seem the time has passed for questioning the authority of that case. At the same time that decision was rendered, the court also decided Mitchell v. Smale, 140 U. S. 406, and it was there said:

> "It has been decided again and again that the meander line is not a boundary, *but that the body of water whose margin is meandered is the true boundary.*" (Our italics).

The same rule was announced in Jefferis v. East Omaha Land Co., 134 U. S. 178; 33 L. Ed. 872. There the court said:

> "In the present case, the plat was made in accordance with the statute showing the river as the northern boundary of fractional Section 21 and of lot 4 therein; and as the patent referred to the official plat of the survey, and it has made that a part of the description of lot 4, that description made the river the boundary of lot 4 on the north."

We are not unmindful of the situation that arises from fraud in the survey or gross mistakes on the part of the surveyor. In such exceptional cases, a re-survey has been approved. This court, however, has repeatedly disapproved of re-surveys of tracts of land between the meander line and the water in fresh water streams so as to deprive the owner of the upland of access to the river. Strips of land along river bottoms are at the time of the original survey usually of so little value that the surveyor intention-

ally omits them from the survey. After the upland has been developed and improved and occupied for years and advanced in value, irresponsible "squatters" have frequently attempted to get possession of the lands between the meander line and the river, but such acts have generally been viewed with disfavor by the courts and it has been repeatedly held that as between the riparian owner of the upland and the "prowling squatter," the former has the better title. See Whittaker v. McBride, 197 U. S. 510; 49 L. Ed. 857.

And even a re-survey of land by the government for the purpose of sale has been disapproved of by this court and by other courts except in cases of fraud or palpable mistake in the first survey. This court in Mitchell v. Smale, *supra*, said:

> "We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more or less than taking from the first grantee a most valuable, and often the most valuable, part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession under a new survey and grant, and to put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title is a cause of vexatious litigation which ought not to be created or sanctioned. The pretense for making such surveys, arising from the fact that strips and tongues of land are found to project into the water beyond the meander line run for the purpose of getting its general contour and of measuring the quantity to be paid for, will always exist, since such irregular projections do always, or in most cases, exist."

The court in the same case in discussing under what circumstances the Land Department would be justified in making a survey, says:

> "We don't mean to say that, in running a pretended meander line, the surveyor may not make a plain and obvious mistake, or be guilty of a palpable fraud; in which case the government would have the right to recall the survey and have it corrected by the court or in some other way."

The Supreme Court of Minnesota in Lamprey v. State, 52 Minn. 181, referring to this matter said:

> "The incalculable mischiefs that would follow if the riparian owner was liable to be cut off from access to the water, and another owner sandwiched in between him and it, whenever the waterline had been changed by accretions or relictions, are self-evident, and have been frequently animadverted on by the courts. These considerations certainly apply to riparian ownership on lakes as well as on streams. * * * The owners of land bordering on them have often bought with reference to access to the water, which usually constitutes an important element in the value and desirability of the land. If the rule contended for by the appellants is to prevail, it would simply open the door for prowling speculators to step in and acquire title from the State to any relictions produced in the course of time by the recession of the water, and thus deprive the owner of the original shore estate of all riparian rights, including that of access to the water. The endless litigation over the location of the original water lines, and the grievous practicable injustice to the owner of the original riparian estate, that would follow, would of themselves be a sufficient reason for refusing to adopt any such doctrine. That the State would never derive any considerable pecuniary benefit—certainly none that would at all compensate for the attempted

evils—we may, in the light of experience, safely assume. Our conclusion, therefore, is that upon both principle and authority, as well as considerations of public policy, the common law is that the same rule as to riparian rights which apply to streams apply also to lakes and other bodies of still water."

In Hardin v. Jordan, *supra*, this court, referring to this matter, said:

> "There should be some extraordinary proof or mistake on the part of the surveyor in order to interfere with the passing of the land as riparian land."

And in Whitaker v. McBride, *supra*, this court said:

> "Possibly they have been regarded as having no stability as tracts of land, but as like sandbars which are frequently found in western waters and are of temporary duration, existing today and gone tomorrow. Be that as it may, there is nothing to indicate any fraud or mistake on the part of the surveyor."

In Grand Rapids, etc., R. R. Co. v. Butler, *supra*, this court had before it a case where the government had caused the island to be surveyed, but the survey was set aside by the court and it was held that the riparian owner had obtained title under the patents to the upland, to the island in question although it lay beyond the meander line of the former survey. The court said:

> "We have no doubt from the evidence that the circumstances were such at the time of the survey as naturally induced the surveyor to decline to survey this particular spot as an island. There is nothing to indicate mistake or fraud, and the government has never taken any steps predicated

on such a theory; and did not survey the so-called island until twenty-five years after the survey of 1831, and nearly twenty years after that of 1837."

In the case at bar, the survey was made in 1868, some forty-seven years ago; and while there is no evidence in the record as to the condition of the island at the time of that survey (due to the fact that adverse possession was the only issue at the last trial of the case in the trial court), it may be safely assumed that the island had absolutely no market value—certainly not sufficient to pay for the survey.

The upland and land that was clear of rosebushes, underbrush and willows and not subject to inundation, had little value at that time, and the surveyor, presumably in good faith, omitted the island from the survey, intending it to go with the riparian land, for he certified the plat as showing and including all land to the main channel of Snake river—in fact, to the Oregon boundary. That survey has not been impeached but on the contrary it has been accepted as correct by all, including the government, and relied upon by entrymen and those who have purchased from the patentees under the official plats based upon that survey.

The Supreme Court of Wisconsin in Franzini v. Layland, 120 Wis. 72, 97 N. W. 499, had before it the right of a riparian owner to an island in the Mississippi river, surrounded by water during all seasons of the year. The court there said:

"We deem the law too well settled here to warrant discussing the subject, that a riparian proprietor on a river, nothing appearing clearly to the contrary, owns, as incident to the shore, all islands opposite the same, so far as his riparian

rights extend. Chandos v. Mack, 77 Wis. 573, 46 N. W. 803; 20 Am. St. Rep. 139, 10 L. R. A. 207. The conveyance to the riparian proprietor of the title to the island in such a case is deemed to have been included in the conveyance of the mainland. As regards the original proprietor, the general government, the omission to take notice of the existence of an island in making the public land surveys, and approval of the survey by sovereign authority, evidences that the omitted land was intended to pass as an incident of the land it lies opposite of, and is appurtenant to it if to any. Fuller v. Dauphin, 124 Ill. 542, 16 N. E. 917, 7 Am. St. Rep. 388. Such evidence is conclusive in the absence of a judicial determination in favor of the government, relieving it from mistake upon the same grounds that a private party might be relieved under the same or similar circumstances. Murphy v. Kirwan (C. C.) 103 Fed. 104. *Obviously, a private person cannot raise the question if the government sees fit not to do so.*" (Our italics).

The views of the Supreme Court of Idaho on this subject were tersely and forcefully stated in Lattig v. Scott, 17 Ida. 506, 532. That court said:

"The lands abutting on this stream have been acquired by pioneer settlers and homesteaders in good faith, and they have, as a general rule, taken possession of and occupied these islands and gravel and said bars, and put them to such use as they could make of them, and if at this late date the government is from time to time to order those islands surveyed and issue patents upon the application of 'prowling squatters' (Murphy v. Kirwan, 103 Fed. 109; Lamprey v. State, 52 Minn. 197, 18 L. R. A. 677), the situation will become lamentable and exceedingly prejudicial and burdensome to settlers and bona fide home-builders. We cannot give our sanction to such a procedure."

While the decision of that court was later reversed by this court on another ground, the views of the court on the hardships and injustice that will follow from attempts to claim by new surveys land lying between the meander line and the running water, which the original survey represented to be the boundary of the upland, have not been changed, and the court does not overstate the situation.

While it may be said that the right of the government to survey the island in question is not now before the court, but that the question here is simply the relative rights of the riparian owners and a "prowling squatter," at the same time the authorities cited on the right of the government to cause resurveys to be made are not without force. We know of no case where the court has held the right of the squatter better than the claim of the riparian owner. Where the land in dispute has not been surveyed and the squatter has not connected himself with the government title through entry of the land under the public land laws, the right of the riparian owner of the upland has invariably been sustained. That was the rule upon which this court decided, Whitaker vs. McBride, 197 U. S. 510, 49 L. ed. 857. It was there said: "In such a case, the rights of riparian proprietors are to be preferred to the claims of the settler."

In the case at bar, the government has never complained of either fraud or mistake in the original survey, and there can be no principle of law that will permit a squatter who has not purchased the title of the government or obtained it through entry or otherwise, to be heard to complain that the government has parted with title to a larger acreage than it received pay for, or that the riparian owner is occupying and using land which, if it is not his, must

be the property of the federal government, and it is not here making complaint.

The few cases where this court has upheld a resurvey and sale of land between the meander line and the body of water which was shown upon the original survey as being the boundary of the land patented, show unmistakably and beyond doubt that the courts recognize the hardships and injustice resulting from such action to the original settler who entered upon and acquired title to the upland, believing it to be bounded by a body of water as shown upon the official survey and plats of the government. It is a matter of common knowledge, accepted by all, that land adjacent to a body of fresh water has added value because of its location and water frontage. This court has repeatedly declined to approve resurveys or to sustain title based upon the new surveys. We cite only a few of the cases sustaining the doctrine that it seems to us should control this case, viz:

Hardin vs. Jordan, 140 U. S. 371, 383; 35 L. ed. 428, 433.

St. Paul & P. R. Co. vs. Schurmeier, 7 Wall. 272, 289; 19 L. ed. 74.

Grand Rapids, etc., Co. vs. Butler, 159 U. S. 87; 40 L. ed. 85.

Mitchell vs. Smale, 140 U. S. 406, 412, 413; 35 L. ed. 442, 444, 445.

United States vs. Chandler-Dunbar Co., 209 U. S. 447, 52 L. ed. 881.

The cases from other federal courts and from the state courts that have rejected resurveys and sustained the title of the riparian proprietor who acquired his land under the original survey, are numerous and we will not undertake to cite them here. The few cases where resurveys have been approved,

are limited to where fraud or palpable mistake clearly appears in the original survey. The leading case on that phase of the subject is Security Land & Exploration Co. vs. Burns, 193 U. S. 167, 48 L. ed. 662. In that case fraud in the original survey was clearly shown. The amount of land involved was at least a thousand acres, and it consisted of tillable upland, covered by timber of "more than a century's growth." It was not low, bottom land, such as we have in the case at bar, covered by brush, rose bushes and willows, and subject to overflow during high water. The land omitted in the case last cited was of such a character that there could be no question but that the land should have been surveyed, whereas the land omitted in the case at bar is of the kind and character usually, if not invariably, omitted from government surveys along rivers and other meandered waters.

In the case of Horne vs. Smith, 159 U. S. 40, 40 L. ed. 68 (decided in 1895), the body of land beyond the meander line was 700 acres, but between this body of unsurveyed land and the land described in the patent of the riparian owner was a large body of water, but not the main channel of the river. The entire evidence was not before this court, as the matter came up on the instructions to the jury, but it may be presumed from what is said in the opinion that the record did not show, as it does here, that the meander line included all the land in the township, in fact in the state, for here the surveyed land extends to the boundary between the states of Idaho and Oregon; and this seems to have been one of the controlling reasons for limiting the riparian owner to the bayou, for the court says, after citing a case from Illinois where there were two branches of the river:

> "So, in the case before us, obviously the surveyors surveyed only to this bayou and called that the river. The plaintiff has no right to challenge the correctness of their action, or claim that the bayou was not Indian river, or a proper water line upon which to bound the lots."

No such contention, however, can be made in the instant case, for here the survey shows that beyond the meander line lies the main channel of Snake river and beyond that lies the state of Oregon. It cannot, therefore, be said that the surveyor only intended to survey to the slough or high-water channel and intended to leave for a future survey the land here in dispute. The survey and the plats based upon it clearly and unmistakably show that that was not the intention of the surveyor.

We think it proper here to call attention to the continually decreasing volume of water flowing in Snake river by the land here in question. The original survey was made in 1868, and it is a part of the public history of the country that the land in the Snake River valley was at that time largely unoccupied and undeveloped. Water was not then being diverted in large quantities for irrigation purposes, but almost the entire runoff of the watershed was carried down the river and helped to swell the volume of water flowing past plaintiff's land. In late years, through the construction of immense irrigation projects in southern and eastern Idaho, above the land in dispute, and the construction of reservoirs for the storage of the spring and flood waters of Snake river and its tributaries, the discharge of the river in the vicinity of the land here involved has been greatly reduced, and what was formerly largely swamp land, subject to frequent inundations

and overflow, has now become tillable and capable of cultivation, occupation and use; and, at the same time, channels that may have carried water throughout a large part of the year, if not the entire year, in 1868, or at the time the original survey was made, are now entirely dry during a large part of the year, if not during the entire year. These changes, however, furnish no basis for the government claiming the right to survey land that has now become habitable and fit for cultivation, thereby depriving the riparian owners of the benefit of water frontage and of access to the body of water which once constituted the boundary of their land.

The rights of these riparian owners might well be determined according to the doctrine that controls reliction rights, or the title to land left uncovered by the receding of the water from its former bed. In such cases, it is settled law that the riparian owner takes to the water and his boundary changes as the water line recedes.

> St. Clair Co. vs. Lovingston, 90 U. S. 46, 23 L. ed. 59.

We submit, however, that on whatever theory the court decides this case, it should view the situation as it was in 1868 when the surveyor made the original survey; and if the conditions then existing were such that the surveyor could not be charged with fraud or palpable mistake in omitting from his survey the land here in dispute, then it must be held that the title of plaintiffs in error is superior to that of a "prowling squatter" who simply appropriates values and property created by others.

The controversies and litigation that follow from resurveys of land beyond the meander line are force-

fully shown in the litigation that followed the resurvey of the lands involved in the case of Security Land and Exploration Co. vs. Burns, 193 U. S. 167. A reference to that litigation will be found in the recent decision of the Circuit Court of Appeals of the Eighth Circuit, in Cloquet Lumber Co. vs. Burns, 207 Fed. 40, 41. The expensive litigation and prolonged controversies that followed would seem to outweigh the possible benefits that could come from the resurvey.

This court, in St. Clair Co. vs. Lovingston, 90 U. S. 46, 23, L. ed. 59, decided in 1874, said:

> "Where a survey and patent show a river to be one of the boundaries of the tract, it is a legal deduction that there is no vacant land left for appropriation between the river and the river boundary of such tract."

Again the court said:

> "Under the circumstances, we cannot doubt that the river was intended to be made and was made the west line of the survey. In the light of the facts, such is our construction of the calls of the survey, and we give them that effect."

The case of St. Paul & P. Ry. Co. vs. Schurmeier, *supra*, was decided in 1869, sustaining the same proposition, and this court had repeatedly held, before plaintiffs in error or their predecessors in interest acquired title to the upland, that the river was the boundary where the survey purported to meander a fresh water stream and represented the stream as the boundary of the land; and we submit that these decisions and the law as therein stated, and the practice of the Land Department in permitting the riparian owner of the upland to take to the water, constitute rules of property upon which entrymen and pur-

chasers have in good faith relied. It should, therefore, be held that whatever the rule of decision or the practice of the Land Department may now be in regard to public surveys and the rights of riparian owners, rights acquired under the law as stated in St. Clair Co. vs. Lovingston, St. Paul & P. Ry. Co. vs. Schurmeier, and other cases of that period, are unaffected by the later changes in the law or the practice of the Land Department.

THE SUPREME COURT OF IDAHO HAD NO POWER TO REVERSE THE TRIAL COURT ON A QUESTION ADMITTED BY THE PLEADINGS.

The issues presented on the first trial and appeal in this cause appear clearly from the decision on that appeal.

> A. B. Moss & Bro. v. Ramey, 14 Ida. 598, and following pages.

At page 602 the court states that defendant in error specifically denied the allegations of the complaint and alleged affirmatively adverse possession and also alleged as follows:

> "That there is an island bordering upon and lying west of the east channel of Snake river, west of the lots described in the plaintiffs' complaint, and that said island is claimed, owned and occupied by the defendant and has been in his possession under claim of ownership since 1893, with full notice and knowledge to the plaintiffs; that on October 5, 1868, the lots described in plaintiffs' complaint were surveyed by the government of the United States, and the west bounddary thereof thereby established and recognized as being the east bank of the east channel of Snake river, and the lots described in plain-

> tiffs' complaint by the patents to plaintiffs' predecessors in interest, limited the quantity to 190.60 acres; and that it was not intended to convey any land to either of the plaintiffs or their predecessors in interest, west of the east bank of said east channel of Snake river."

When the case was sent back for retrial, the amended answer qualified these denials. The allegations of paragraphs 1, 3 and 4 of the complaint are not denied at all, and the allegations of paragraphs 2 and 5 of the complaint are only denied in part by par. 1 of the amended answer (Trans. p. 5). This paragraph merely denies that plaintiffs in error are *now* the owners or in possession of or entitled to the possession of the land in controversy. These allegations are certainly material to the case made by the plaintiffs in error, and under Sec. 4217 of the Idaho Rev. Codes, which provides:

> "Every material allegation of the complaint not controverted by the answer, must, for the purposes of the action, be taken as true,"

defendant in error has admitted that title to the land in controversy was acquired by the predecessors of the plaintiffs in error under their patents, and conveyed by the patentees to them. That such admission was intentional is shown clearly by the fact that the affirmative allegations quoted above are eliminated entirely and several other material changes made in the answer to correspond. The effect of these changes is well stated by Mr. Chief Justice Ailshie in the opinion herein (Trans. p. 61), as follows:

> "When the case went back for retrial, the pleadings were so amended as to reduce the issue merely to one of adverse possession, and the trial

court found that issue against the defendant and in favor of the plaintiffs."

The case was therefore presented to the trial court on the theory that title was originally acquired by the plaintiffs in error, but that defendant in error claimed to have divested such title by adverse possession. Findings 1 to 7, inclusive (Trans. pp. 8 to 9), of the trial court are based wholly on the admissions of the defendant in error and are in exact accord with the decision of the Supreme Court of Idaho on the first appeal. Under these circumstances, clearly no error can be found in the making of such findings.

Under Section 4217, Idaho Rev. Codes, above quoted, an admission by failure to deny is sufficient to support a finding of the fact so admitted. See Broadbent vs. Brumback, 2 Ida. 366, 16 Pac. 555.

In Knowles vs. New Sweden Irrigation Dist., 16 Ida. 217, 101 Pac. 81, the rule as to admissions in pleadings is well stated at page 229 of the Idaho Reports as follows:

> "Admissions made in a pleading are denominated solemn admissions and are not required to be supported by evidence on the part of the adverse party. Such admissions are taken as true against the party making them, without further proof or controversy."

And in 2 Ency. of Law and Practice, at p. 179, the following rule is laid down:

> "Where a party by the pleadings admits a portion of the case against him, he is bound thereby on appeal." (Citing cases).

In 3 C. J., 735, it is said:

> "Where a fact is admitted, conceded, or assumed without objection in the trial court, it can-

not be contested in the appellate court or objected that there was no evidence on the question, but the theory in the trial court will be adhered to. This is true, of course, of facts admitted by the pleadings either expressly or by failure to deny."

This is the latest authority on the subject of appeal and error, and numerous cases are cited in support of the text, including Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553.

In Eakin v. Frank, 21 Mont. 192, 53 Pac. 538, a similar question was before the Supreme Court of Montana, and that court states:

"No suggestion was made to the district court by plaintiff that he desired to abandon the issues framed by the pleadings, or to interpose defenses not stated by the reply filed. He thus elected to put himself in the attitude of one making material admissions of fact, and proceeding with the case upon such admissions. *Under the circumstances he cannot mend his hold in the Supreme Court, and assert a right to go without the lines within which he voluntarily confined himself in the district court.*" (Our italics).

The appellate jurisdiction of the Supreme Court of Idaho is fixed by Sec. 3817, Idaho Rev. Codes, as follows:

"Section 3817. Its appellate jurisdiction extends to a review of all cases removed to it under such regulations as are or may be prescribed by law, from the final decisions of the district courts, or the judges thereof."

And in Section 4824 of the Idaho Rev. Codes, it is provided, among other things, as follows:

"Upon an appeal from a judgment, the court may review the verdict or decision and any intermediate order or decision, if excepted to, which

involves the merits or necessarily affects the judgment, except a decision or order from which an appeal might have been taken."

How, then, was the question of whether title to this land originally passed to plaintiffs in error removed to the Supreme Court of Idaho for review? That court had squarely and definitely decided that question on the first appeal. No rehearing or writ of error was sought, and instead of saving the question by retaining his original pleadings, which defendant had a perfect right to do, he acquiesced in that decision and amended his answer so as to take this question entirely out of the case. The trial court's decision on this point was strictly in accordance with the original decision of the Supreme Court and such admissions. It is true that the specifications of error on defendant's motion for a new trial (Nos. 1 to 4, Trans. pp. 49 and 50) seek to raise this question, and the question was urged on the state Supreme Court but the trial court's findings were sustained by the admissions, and it is obvious that a party cannot seek to inject any issues into a case on motion for a new trial when his pleadings admit the facts which he seeks to controvert by such motion.

The ruling is thoroughly established in the Supreme Court of Idaho, as in appellate courts generally, including this court, that only questions presented to the trial court for decision can be raised upon appeal, and the question of whether title to the land in controversy passed to the patentees of the mainland lots and thence to plaintiffs in error was never before the trial court for decision. The Idaho Supreme Court has refused to pass on questions not raised in the trial court in many cases, among which are:

Lamkin v. Sterling, 1 Ida. 120, 123.
Miller v. Donovan, 11 Ida. 545, 83 Pac. 608.
Medbury v. Maloney, 12 Ida. 634, 88 Pac. 81.
Marysville, etc. Co. v. Home Insurance Co., 21 Ida. 377, 121 Pac. 1026.
Pomeroy v. Gordan, 25 Ida. 279, 137 Pac. 888.

In the case at bar, no error could be found in the decision of the trial court. The error supposed to exist was in the previous decision of the Supreme Court, but the question there determined was not before the trial court or the Supreme Court on this appeal. The action of the Supreme Court was merely a reconsideration by it of the question finally determined in the identical case five years before, which question defendant in error had purposely eliminated from his pleadings. The reason for this elimination was doubtless the contention made by plaintiffs in error on the first appeal that defendant in error could not obtain title by adverse possession while he was insisting that the legal title rested in the United States, and that if he wished to claim title by adverse possession he must concede that title had passed from the government. In any event, he did eliminate from the case the federal question as to whether this was unsurveyed public land, and we submit that the action of the court in passing upon this question was an entire departure from the established rules of judicial procedure without any express or implied provision of the constitution or statutes of the State of Idaho to authorize it and wholly without precedent to support it. Viewed in this light, such action seems to be an arbitrary departure from established principles of judicial procedure in an individual case, and as such to amount to a denial of due process of law.

In 5 Ency. U. S. Supreme Court Reports, p. 618, it is said:

> "It may be stated, then, that law, in its regular course of administration through the courts of justice in the several states according to the settled course of judicial proceedings, is due process, and the requirements of the fourteenth amendment are satisfied when this is secured by the law of the state operating upon all persons alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."

Citing numerous decisions of this court.

UNDER THE RULE OF LAW OF THE CASE THE SUPREME COURT OF IDAHO HAD NO POWER TO CHANGE ITS FORMER DECISION HEREIN.

Either of the points already urged in this brief seem to us sufficient to merit a reversal of the decision of the Supreme Court of Idaho herein, but if we assume that the question of whether title to the land in controversy was acquired by plaintiffs in error under the patents from the federal government was still in the record and that the former decision of the Supreme Court of Idaho on this point was in conflict with Scott vs. Lattig, supra, and therefore erroneous, we nevertheless submit that that court was without power under the rule of law of the case, as recognized by it and by appellate courts generally, including this court, to reverse the trial court and order a dismissal of the action or to grant a new trial.

The rule of law of the case is well stated in Westerfield vs. New York Life Ins. Co., 157 Cal. 339, 107 Pac. 699-700, as follows:

"The doctrine of the law of the case is this, that where, upon an appeal, the Supreme Court in deciding the appeal states in its opinion a principle or rule necessary to the decision, *that principle or rule becomes the law of the case, and must be adhered to throughout its subsequent progress*, both in the lower court and upon subsequent appeal * * * and this, although in its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular." (Our italics).

In one of the earliest Idaho cases on the subject, Lindsay vs. People, 1 Ida. 438, it is held:

"A decision of the Supreme Court in a given case, even although it be erroneous, becomes the law of the case upon the points involved *and cannot be reviewed, altered, or changed* upon a subsequent hearing in this court." (Our italics).

In Hall vs. Blackman, 9 Ida. 555, 75 Pac. 608, it is said:

"In 2 Ency. of Pleading and Practice, page 371, the author says: 'The doctrine of *res adjudicata* and the principles upon which it rests apply, therefore, to appellate judgments; *the principles and questions adjudicated on an appeal are binding and will not be reviewed* as between the parties and their privies on a subsequent appeal in the same cause. The law so declared controls all further proceedings in the cause until the termination.' The authorities to this effect are too numerous to require further citation. There must necessarily be an end to litigation in any given case; but that object can never be attained if an appellate court can re-examine, upon subsequent appeals, the same questions which it has previously examined, *and the fact that it may have made a mistake or committed an error will not warrant a re-examination and reconsidera-*

tion upon another appeal in the same case. The court is at liberty, in a separate and independent case, to depart from any rule or principle which it may have announced that it afterward determines unsound or unwise to follow, but the conclusion reached becomes final and the law of the case in which it is announced." (Our italics).

This decision can leave no doubt as to the rule in Idaho, and in fact the rule of that case was approved by the court in its opinion herein (Trans. p. 61).

To the same effect are:

Hunter vs. Porter, 10 Ida. 86, 77 Pac. 439.
Steve vs. Bonners Ferry Lbr. Co., 13 Ida. 384, 394, 92 Pac. 363.
Gerber vs. Nampa, etc., Irrigation Dist., 19 Ida. 765, 116 Pac. 104.
City of Nampa vs. Nampa and Meridian Irrigation Dist., 23 Ida. 422, 131 Pac. 8.

This rule has been announced and followed in a great many cases in this court and in the Circuit Court of Appeals and most of these cases are cited supra under Points and Authorities.

The Supreme Court of Idaho declined, however, to apply the rule of law of the case which it conceded prevails in Idaho, because it thought a federal question was involved, and that this court had expressed a different view as to the law applicable to a state of facts which the Supreme Court of Idaho considered the same as the present case in Scott vs. Lattig, 227 U. S. 220, 57 L. Ed. 490, and that it was incumbent upon it to follow the decision of this court in such case. The conclusion reached seems to rest partly on the theory that the rule of law of the case is a rule of practice only and not a limitation on the power of the appellate courts; and partly on the the-

ory that on federal questions the Supreme Court of a state is in the status of an intermediate appellate court only, and that the rule of law of the case does not apply to such courts. Certain cases in this court are cited to support this departure from the rule of law of the case (Trans. p. 61), but we submit that only one of these cases even tends to support the state court's decision and that the observations made in that case were not necessary to the decision and are in conflict with the actual holdings in an imposing array of cases decided by this court.

The case of Bostwick vs. Brinkerhoff, 106 U. S. 3, 27 L. Ed. 73, cited in this connection, relates wholly to what constitutes a final decision from which a writ of error will lie, and has no bearing on the rule of law of the case except for the purpose of determining whether a writ of error lay from the decision on the first appeal of this case.

The cases of United States vs. Denver & R. G. R. R. Co., 191 U. S. 84, 48 L. Ed. 106, and Zeckendorf vs. Steinfeld, 225 U. S. 445, 56 L. Ed. 1156, arose upon writs of error to the highest courts of territories, which are merely intermediate appellate courts in cases involving over $5,000,000, while the case of Messinger v. Anderson, 225 U. S. 436, 56 L. Ed. 1152, arose on *certiorari* to the United States Circuit Court of Appeals. The question presented by all three of these cases was whether, where there had been two or more appeals to the inferior court and that court had held in the decision brought up that it was bound by its former decision as the law of the case, the Supreme Court of the United States was equally bound by that prior decision of such inferior court. The decision in all of these cases was of necessity that the Supreme Court of the United States

was not precluded by the earlier decision of the inferior court, but that the whole case, from beginning to end, was before it for review. In each of these cases it was conceded that the lower court was bound by its former decision, but the Supreme Court held that such former decision was before it for review.

But these cases in no way qualify the rule which this court has announced and followed in numerous decisions beginning with Himeley vs. Rose, 5 Cranch. 314, 3 L. Ed. 220, decided in 1809 and ending apparently with United States vs. Camou, 184 U. S. 572, 46 L. Ed. 694, and Richardson vs. Ainsa, 218 U. S. 289, 54 L. Ed. 1044, that this court has no power on a second writ of error in the same case to re-examine and re-determine questions before it on a previous writ of error and decided by it.

In Messinger vs. Anderson, supra, in which the decision of this court was written by Mr. Justice Holmes occurs the following statement:

> "In the absence of statute the phrase, 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of the courts generally to refuse to reopen what has been decided, not a limit to their power. King v. West Virginia, 216 U. S. 92, 100, 54 L. Ed. 396, 401, 30 Sup. Ct. Rep. 225; Remington v. Central P. R. Co., 198 U. S. 95, 99, 100, 49 L. Ed. 959, 963, 25 Sup. Ct. Rep. 577; Great Western Teleg. Co. vs. Burnham, 162 U. S. 339, 343, 40 L. Ed. 991, 993, 16 Sup. St. Rep. 850."

As above stated, the decision in this case was that the Supreme Court was not bound by a decision of the Circuit Court of Appeals on a prior appeal, and the statement was unnecessary to the decision of the case, as is shown clearly by the very next sentence

of the opinion which is, "Of course this court at least is free when the case comes here."

It seems to be the established rule that where a decision of a state court or a lower federal court is not final so as to entitle a party to a writ of error and he retains the federal question in his pleading until a final decision is rendered, this court will examine into and determine such federal question.

See Chesapeake & Ohio R. R. Co. vs. McCabe, 213 U. S. 207, 53 L. Ed. 765.

But in the present case defendant in error eliminated the federal question from his pleading, and if the decision of the Supreme Court of Idaho had been adverse to him, it seems clear that this court would have refused to entertain jurisdiction, and hence the principle can have no application here.

An examination of the numerous cases decided by this court on the rule of law of the case shows that they have been decided uniformly on the theory that such rule is a limitation on the power of the court to pass upon and determine a question previously decided by it. This is well illustrated by the case of Washington Bridge Co. vs. Stewart, 3 Howard 413, 11 L. Ed. 658, where on a former writ of error the court had decided the case on its merits and on the second writ of error a want of jurisdiction was urged. The court said at page 664, referring to the case of Skillern's, Executors, v. May's, Executors, 6 Cranch. 267, 3 L. Ed. 220, which had presented the same question:

> "When that cause was before this court, though the judgment of the court below on it would have been reversed, upon motion, for the want of jurisdiction on the face of the record, the defect having escaped the notice of the court and

of counsel, and the court having acted upon its merits, it determined that its decree should be executed. The reason for its judgment no doubt was, that the motion to dismiss the case, in the court below, for the want of jurisdiction, after it had been before the Supreme Court by writ of error, and had been acted upon, would have been equivalent, had it been allowed, to a decision that the judgment of this court might be reviewed, when the law points out no mode in which that can be done, *either by this or any other court. The want of power in this court to review its judgments or decrees, has been so frequently determined by it, that it is not now an open question.*" (Our italics).

The sentence last quoted expresses the actual decision of the court and shows that as early as 1845, *the power of this court to review its own judgments was not "an open question."*

In Chaffin v. Taylor, 116 U. S. 567, 29 L. Ed. 727, 729, the court states:

"That question is no longer open in this case for the reason that it has long been settled that *whatever has been decided here on writ of error cannot be re-examined on a subsequent writ brought in the same suit.* This rule was distinctly stated in Supervisors v. Kennicott * * * where numerous authorities are cited, beginning as early as Himeley v. Rose * * *." (Our italics).

In Sibbald v. United States, 12 Pet. 488, 9 L. Ed. 1167, 1169, the court states:

"Appellate power is exercised over the proceedings of inferior courts, not on those of the appellate court. The Supreme Court have no power to review their decisions, whether in a case at law or in equity. A final decree in chancery is as

conclusive as a judgment at law (1 Wheat. 355; 6 Wheat. 113, 116). Both are conclusive on the rights of the parties thereby adjudicated.

"*No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decree or judgments for errors of fact or law, after the term in which they have been rendered,* unless for clerical mistakes (3 Wheat. 591; 3 Peters, 431), or to reinstate a cause dismissed by mistake (12 Wheat. 10); from which it follows that no change or modification can be made, which may substantially vary or affect it in any material thing. * * *

"Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. They cannot vary it, or examine it for any other purpose than execution, or give any other or further relief, or review it upon any matter decided on appeal for error apparent, or intermeddle with it, further than to settle so much as has been remanded. * * * After a mandate, no rehearing will be granted. It is never done in the House of Lords, and on a subsequent appeal, nothing is brought up but the proceeding subsequent to the mandate." (Our italics).

Other cases in this court adhering to this rule are:

Gaines v. Caldwell, 148 U. S. 228, 37 L. Ed. 432.

Magwire v. Tyler (Tyler v. Magwire) 17 Wall. 253, 294, 21 L. Ed. 576.

Illinois ex rel. Hunt v. Illinois Cent. R. Co., 184 U. S. 77, 46 L. Ed. 440.

U. S. v. Camou, supra.

One of the leading cases on this point is Leese vs. Clark, 20 Cal. 416, an opinion by Mr. Justice Field, where it is said:

"A previous ruling of the appellate court * * * upon a point distinctly made, may only assist in other cases to be followed and affirmed, or to be modified and overruled according to its intrinsic merits, but in the case in which it was made, it does more than assist; *it is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves.*" (Our italics).

To the same effect are:

Wright v. Carson Water Co., 39 Pac. 812, 873 (Nev.).
Applegate v. Dowell, 20 Pac. 429 (Ore.).
26 Am. & Eng. Ency. of Law, 184.
Tally v. Ganahl, 151 Cal. 418, 90 Pac. 1049.
1 Spelling New Trial and Appellate Practice, Sec. 691, p. 1498.

The above authorities show clearly that the rule of law of the case is a limitation on the power of appellate courts generally to re-examine their own decisions after their mandate has once gone down to the lower court, and the cases cited in the passage which we have quoted from Messinger v. Anderson, supra, when carefully examined are found not to qualify this rule.

In Remington v. Central Pacific Ry. Co., 198 U. S. 95, 49 L. Ed. 959, the state court had denied a motion to quash service. The case was then removed to the Federal Court and the motion renewed and granted. There were two features in this case which made the rule of law of the case inapplicable. In the first place, the decision relied upon was not the decision of the Federal Circuit Court but a decision of the state court; and, secondly, such decision involved only a motion and did not amount to a final

judgment. It is well settled that the rule of law of the case and the kindred doctrine of *res adjudicata* do not apply to motions. On this point see:

Lawson v. Lawson (Cal.) 115 Pac. 461, 463.
Ventura County v. Clay, 119 Cal. 213, 51 Pac. 189.
Reeves & Co. v. Best, (Colo.) 56 Pac. 985.
Riggs v. Pursell, 74 N. Y. 370.

This court, speaking through Mr. Justice Holmes, said that the federal courts might have granted leave to renew the motion and stated further, "However stringent may be the practice, in refusing to reconsider what has been done, it still is but practice, not want of jurisdiction, that makes the rule." This statement of the law is correct when strictly applied to motions, but is erroneous when applied to final judgments as shown by the above authorities.

In King vs. West Virginia, 216 U. S. 92, 54 L. Ed. 396, the original decree of the trial court had been reversed in part, and on a subsequent appeal to the Supreme Court of West Virginia, new parties having come into the case, the decree was further modified. This last decision was brought here by writ of error and this court in an opinion by Mr. Justice Holmes, said: (54 L. Ed. 401): "But the construction and effect of that decree, how far it bound the state, and whether or not it bound parties subsequently coming in, were matters of state procedure alone." It would seem that the coming in of new parties between the first and second decree made the rule of law of the case inapplicable, and it appears also that the late decree only changed the rights of plaintiff in error as to persons who came in after the first decree (54 L. Ed., p. 400).

The court does, however, apply the statement made

in the Remington case, supra, to this decree in the following passage:

> "It is said that the decree established the law of the case, but that phrase expresses only the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. Remington v. Central P. R. Co., 198 U. S. 95, 999, 100, 49 L. Ed. 959, 973, 25 Sup. Ct. Rep. 577. See Great Western Teleg. Co. v. Burnham, 162 U. S. 339, 343, 40 L. Ed. 991, 993, 16 Sup. Ct. Rep. 850. *In some states it is true that a stricter rule is applied.* (Northern P. R. Co. v. Ellis, 144 U. S. 458, 36 L. Ed. 504, 12 Sup. Ct. Rep. 724), but there is nothing in the Constitution of the United States to require it, or to prevent a state from allowing past action to be modified while a case remains in court." (Our italics).

The first sentence of the above quotation we submit expresses a rule followed in only one or two states and then only in exceptional cases, and it is a rule that has never been followed by this court in regard to its own prior decisions. This exception is stated in 3 Cyc. at page 397, also quoted by the Supreme Court of Idaho, supra; and an examination of the cases from the various jurisdictions shows that this exception is statutory in Alabama and rests partly on a peculiar constitutional provision in Missouri, and seems to be adhered to in Texas without any statutory authority. The other cases in support of it are scattering decisions from a few other states, many of which have been expressly or impliedly overruled.

On the other hand, the case of Northern Pacific Ry. Co. v. Ellis, 144 U. S. 458, 36 L. Ed. 504, cited in the passage from King v. West Va. announces the majority rule, supported by the decisions of this court, which we have quoted above, and this rule is

settled law in Wisconsin, California, Idaho, and practically every other American jurisdiction, except Texas and Missouri, including Alabama before the change in the statute. It would seem, therefore, that in view of the peculiar circumstances in the King case this statement should not be accorded too much weight in other cases, especially as it is not supported by the Remington case, which we have already discussed, or the case of Great Western Teleg. Co. v. Burnham, 162 U. S. 339, 343, 40 L. Ed. 991.

In the latter case, an attempt was made to take writ of error from this court to the circuit court of Milwaukee county, Wisconsin, on the theory that because the Supreme Court of Wisconsin had decided the question involved on a prior appeal, it would affirm the judgment as a matter of course and the Supreme Court of the United States would decline jurisdiction on writ of error to the Supreme Court of Wisconsin. This court dismissed the writ of error, intimating that it would have entertained jurisdiction if the case had come to it by way of the Wisconsin Supreme Court, and in so doing stated:

> "It is true that the Supreme Court of Wisconsin upon a second appeal from an inferior court, has always declined to reconsider any question of law decided upon the first appeal. Downer v. Cross, 2 Wis. 371, 381; Noonan v. Orton, 27 Wis. 300; Du Pont v. Davis, 35 Wis. 631; Lathrop v. Knapp, 37 Wis. 307; Oshkosh Fire Dept. v. Tuttle, 50 Wis. 552. It does not, however, as appears by the two cases last cited, when that question is the only one presented by the second appeal, dismiss that appeal for want of jurisdiction; but it entertains jurisdiction, and affirms the judgment. *In so doing, that court has done no more than this court has always done, or than is*

necessary to enable an appellate court to perform its duties satisfactorily and efficiently, which would be impossible if a question, once considered and decided by it, were to be litigated anew in the same case upon any and every subsequent appeal. Washington Bridge Co. v. Stewart, 44 U. S. 3 How. 413, 425 (11: 658, 664); Roberts v. Cooper, 61 U. S. 20 How. 467, 481 (15: 969, 974); Clark v. Keith, 106 U. S. 464 (27: 302); Chaffin v. Taylor, 116 U. S. 567 (29: 727); Re Sanford Fork & Tool Co., 160 U. S. 247, 259 (ante 414, 417)." (Our italics).

Inasmuch as the cases from this court cited in the above quotation all adhere strictly to the rule of law of the case as followed in practically all American jurisdictions, this case can afford no support whatever to the statement made in King v. West Virginia and Messinger v. Anderson, supra.

In the carefully considered case of Magwire v. Tyler, 17 Wall. 253, 294, 21 L. Ed. 576, at page 583, this court said:

"Repeated decisions of this court have established the rule that a final judgment or decree of this court is conclusive upon the parties, and that it cannot be re-examined at a subsequent term *as there is no Act of Congress which confers any such authority.*" (Our italics).

This statement is exactly the converse of the proposition announced in Messinger v. Anderson, supra, that in the absence of a statute the rule of law of the case is merely a rule of practice, and the authorities in this court and the various state courts sustaining the rule of law of the case all rest upon principles of common law in relation to appellate procedure and not upon statutes, thus showing clearly that it is only

by virtue of a statute that an appellate court can re-examine its previous decisions.

These authorities seem to indicate clearly, therefore, that the Supreme Court of Idaho had no power to re-examine its former decision in the present case, and we think the further fact referred to in the court's opinion that it was not a court of last resort on federal questions can make no difference in the rule. In the first place, as we have already shown, no federal question was before the Supreme Court of Idaho on this second appeal, although it assumed to decide and did decide a federal question when it declined to give effect to the United States patents to the predecessors in interest of plaintiffs in error, and held the land in controversy to be still part of the public domain of the United States.

The exception sought to be established by the Supreme Court of Idaho to the rule of law of the case is, however, inapplicable, according to a number of well-considered decisions, even in cases where the decision is rendered by an intermediate appellate court, and we are certain that there is no case in which the highest court of a sovereign state has voluntarily placed itself upon the level of an intermediate appellate court, even where federal questions are involved.

The case of Silva v. Pickard, 14 Utah 245, 47 Pac. 144, presented exactly this question. The amount in controversy was more than $5,000, so that either party might have appealed from the first decision of the Supreme Court of the Utah territory to this court, but neither party so appealed. On the second trial certain evidence was excluded in accordance with the holding on the first appeal, and this action was assigned as error, on the ground that the Su-

preme Court of the territory was not a court of last resort and the rule of *res adjudicata* could not apply. No question was raised as to the general rule of law of the case, but it was said to be inapplicable, and after showing that this rule was a limitation on the power of the appellate courts generally and referring to the limited number of jurisdictions having intermediate appellate courts, the court makes the following statement:

> "A careful search among the decisions in these jurisdictions reveals no support for the position taken by the appellant; but the rule seems to be that when an appellant ceases to pursue his appeal from one appellate court to a higher, though he might do so, *the decision of the court where he sees fit to rest is a final one, within the meaning of the rule invoked by the respondents.* (Metcalf v. Del Valle, 66 Hun. 627, 20 N. Y. Supp. 984; In re Nelson, 66 Hun. 632, 21 N. Y. Supp. 1123; Excelsior Brick Co. v. Village of Haverstraw, 66 Hun. 531, 21 N. Y. Supp. 99; Corn v. Rosenthal (Com. Pl:) 22 N. Y. Supp. 700; Morss v. Hawley, 69 Hun. 614, 23 N. Y. Supp. 1144; Whitesides v. Cook, 43 Ill. App. 183; Ogle v. Turpin, 8 Ill. App. 453-458; Steele v. Thompson, 38 Mo. App. 312. See, especially, Lackland v. Smith, 75 Mo. 307." (Our italics).

This principle is carried to this point, that, where pending a second trial or appeal in a cause, the rule of law upon which the first decision was based has been overruled or repudiated by a higher court in another case, the court which decided the original appeal is nevertheless absolutely precluded from re-examining its former decision, except for the purpose of determining what was actually decided in such opinion.

This question was passed upon in the case of Dis-

trict of Columbia v. Brewer, 32 App. D. C. 388, which is a strong case because the Supreme Court of the District is merely an intermediate appellate court in cases involving over $5,000.00. The facts were thus stated by the court:

> "The case in all its essential details was here fourteen years ago (District of Columbia v. Brewer, 7 App. D. C. 113), and it was then held that the plaintiff Harrison G. Brewer, appellee here, had no right of action because of his contributory negligence. In 1903 the Supreme Court of the United States in deciding another case from this court (Mosheuvel v. District of Columbia, 191 U. S. 247, 48 L. Ed. 170, 24 Sup. Ct. Rep. 57, S. C. 17 App. D. C. 401), to which the rule announced in this case had been applied, discussed the decision of this court in this case and found the reasoning and conclusion therein erroneous. Thereafter a new trial was had in this case, it having been permitted in the meanwhile to lie dormant in the court below, which resulted in a verdict and judgment for the plaintiff. The defendant appealed."

The court then continued:

> *"The sole question presented is whether the former adjudication of this case by this court constituted the law of the case, notwithstanding the above decision of the Supreme Court in the Mosheuvel case.*
>
> "It is not necessary to discuss the general rule that a prior decision is conclusive on the same question on a subsequent appeal, for no rule is more firmly established or rigidly adhered to; (citing cases).
>
> "A departure from the general rule is sought in this case, because, it is contended, the decision in the Mosheuvel case is in effect a reversal of our decision in this case, and, therefore, controlling here. If plaintiff's postulate is correct, his con-

clusion logically follows: We think, however, his postulate involves a misapprehension of the Mosheuvel decision. That decision was not rendered in this case, and the court considered our former opinion herein solely for the purpose of the case before it. The court repudiated the doctrine announced by us in this case, but left the decision exactly where it was, and while *the rule announced by the Supreme Court in that case will control and govern future cases in this court, it affects this case no more than it does any other case previously disposed of by us.*

"Questions both of law and of fact, when finally determined by a judgment of a court of competent jurisdiction, are, while that judgment remains in force, res adjudicata as between the parties. *The jurisdiction of the Supreme Court of the United States, if invoked at all, must be invoked in the manner prescribed by law, and until it is invoked a decision once reached by us, after the time has expired within which a rehearing may be allowed, is beyond our control.* The great weight of authority is in harmony with this view. 34 L. R. A. 321-330; 26 Am. & Eng. Ency. of Law 2d Ed. p. 184.

"In Ogle v. Turpin, 8 Ill. App. 453, the precise question here involved was determined. There, between the first and second appeals in the appellate division, the Supreme Court of the state rendered a decision in another case inconsistent with the prior decision of the appellate division. The court was asked to readjudicate the question passed upon in its former decision, but declined to do so, saying: 'On the former appeal, this cause was remanded for further proceedings not inconsistent with the opinion filed, and the principles laid down in the opinion were such as to leave no discretion in the court below to render any other decree than the one which has been rendered, so

long as the record remained essentially unchanged.'

"In Tipton v. Indianapolis P. & C. R. Co., 89 Ind. 101, it was held that where, since the prior decision, the court had held in other cases a contrary doctrine, the prior decision was nevertheless the law of the case, as between the parties to that action.

"To the same effect are Brown v. Marion Nat. Bank, 18 Ky. L. Rep. 186, 35 S. W. 926; Thomson v. Albert, 15 Md. 268; Lombard v. Gregory, 88 Iowa, 431, 55 N. W. 471; see also: Saulsbury v. Iverson, 73 Ga. 735; Fortenberry v. Fraxier, 5 Ark. 202, 39 Am. Dec. 373; Burlington C. R. & N. R. Co. v. Dey, 89 Iowa 13, 56 N. W. 267; Herrick v. Belknap, 27 Vt. 688; Cleveland v. C. C. & St. L. R. Co. v. Alfred, 123 Ill. App. 477.

"We hold, therefore, that, notwithstanding the decision in the Mosheuvel case, our prior decision constituted the law of this case, and that the court below was not at liberty to depart from it." (Our italics).

In the case of Ogle v. Turpin, 8 Ill. App. 453, the cause had been appealed to the Illinois Appellate Court and remanded for a new trial. Pending this trial, the Supreme Court of Illinois rendered a decision in another case inconsistent with the prior decision of the Appellate Court, but both the lower court and the appellate court held that they were bound by the former decision as the law of the case.

The case of Bank of Commerce v. State, 96 Tenn. 591, 36 S. W. 719, presents practically the same state of facts that the Supreme Court of Idaho thought was involved in the case at bar. It was a bill to collect taxes alleged to be due from the bank to the city of Memphis during a period of years and aggregating about $100,000. The bank's charter provided for a certain tax on its shares of stock in lieu of other

taxes, and by virtue of this provision it claimed an exemption from the general ad valorem tax on its capital stock and surplus, and that its shareholders were also exempt from paying taxes on their shares of stock. The state's case was presented in the alternative, that either the bank was liable for a general tax on its capital stock and surplus or that the individual shareholders were liable for such a general tax on the shares held by them. The state supreme court sustained the exemption as to the tax on the capital stock, although the decree was silent on this subject, but held it liable on the surplus and that the shares of the individual shareholders were taxable. On writ of error to this court it was held (161 U. S. 134, 40 L. Ed. 645) that the exemption in the charter only extended to the shares of stock in the hands of the individual shareholders, and that the surplus was liable to taxation. It was also held that the question of whether the stock of the bank was subject to tax was not before the court for decision, because the state court had decided that point in favor of the rights claimed under the federal constitution; but in Shelby County v. Union and Planters Bank, 161 U. S. 149, 40 L. Ed. 650, which was argued with the Bank of Commerce case and decided on the same date and which involved the same tax law and a similar exemption clause but which came up by appeal from the United States Circuit Court, this court held that both the capital stock of the bank and the surplus were subject to general taxation while the shares of stock in the hands of the individual stockholders were not. When the mandate came down to the Supreme Court of Tennessee in the Bank of Commerce case, the state moved to have the decree changed so as to declare the Bank of Commerce liable for the tax on its capital stock as well as on its surplus in accordance with the

opinion of this court in the Union and Planters Bank case. The court held, (1) that it would consult its former opinion as well as the decree entered in order to learn what was actually decided when the case was before it; (2) that it had held in its former decision in the case that the capital stock was exempt from general taxation; (3) that it had no power to reverse this holding, even though the Supreme Court of the United States in another case had decided that such holding was erroneous. The court said:

> "This brings us to the second question, which is, whether we now have the power to reverse, change or modify our decree of the last term, or to now pass a decree inconsistent with our adjudication of that term? It is settled and familiar law that no court can, upon a second writ of error or appeal, although in the same case and between the same parties, change its ruling of a former term. Supervisors v. Kennicott, 94 U. S. 499; Clark v. Keith, 196 U. S. 464 * * * If the Supreme Court of the United States could not have directed the court by mandate to change its rulings and tax the stock because it had not jurisdiction of the question, and if that court, upon the second writ of error, is concluded by its judgment of a former term, although in the same case and between the same parties, upon what principle can this court go behind its judgment of a former term, although in the same case and between the same parties. Had the Supreme Court of the United States had jurisdiction of this question, and by its mandate directed this court to reverse its decree, then there could be no question either as to our jurisdiction or our duty to enter such decree. We are of the opinion that this court has no power to now pass a decree taxing the stock of the Bank of Commerce for the years here involved nor to decree payment of the previous taxes for said years."

In this Tennessee case, therefore, the holding of the State Supreme Court on this question had been expressly repudiated by the United States Supreme Court, and the result of following the rule of "law of the case" was to allow the bank to escape liability for $100,000.00 of taxes which the Supreme Court of the United States had declared in effect were lawfully assessed, and which the State Supreme Court, as shown by litigation between the same parties involving taxes for later years, thought were lawfully assessed. And yet, in spite of the magnitude of the public interest involved and the clear ruling of the United States Supreme Court on the precise point, the Supreme Court of Tennessee held the rule of "law of the case" an absolute limitation on its power, entirely precluding it from re-examination of the question. There, it was only a question of reviewing its own decree. Here, the Idaho court in order to pass upon this question had to review its own decree, based on another record, and also had to reverse the trial court without finding any error in its decision. And, instead of the great public interests involved in the Bank of Commerce case, we have here a property right depending upon the construction of the United States statutes relating to public lands established by decree of the Supreme Court of Idaho, and which became conclusive at the time the petition for rehearing in this case expired and the remittitur went down, and the effect of which right of property was conceded by defendant in error when he filed his amended answer, as we have already shown.

Sec. 3818 of the Idaho Revised Codes, relating to disposition of appeals by the Supreme Court, provides in part as follows:

"The court may reverse, affirm or modify any

order or judgment appealed from and may direct the proper judgment or order to be entered or direct a new trial or further proceedings to be had. Its judgment must be remitted to the court from which the appeal was taken."

Rule 60 of the Rules of the Supreme Court of Idaho provides that—

"All applications for rehearing * * * shall be presented within twenty days after the judgment or order made by the court * * *."

Rule 61 provides as follows:

"Remittitur, Civil Cases—In civil cases no remittitur to the court below shall be issued until after the expiration of twenty days from the entry of judgment: *Provided*, That where a rehearing is granted the remittitur shall be issued forthwith after judgment is entered thereon."

The report of the first decision on this appeal, Moss & Bro. v. Ramey, 14 Ida. 598, shows that no petition for rehearing was filed, hence that decision became final early in April, 1908, and until the decision of May 17, 1913, such decree was supposed to have conclusively settled the proposition that plaintiffs in error acquired title to the land in controversy under their patents from the United States government.

Under the circumstances of this case, it seems clear that the power of the state court to review its previous decision on this question involves a federal question. Plaintiffs in error claimed that the land in controversy passed, under the United States patents, to their predecessors. It was admittedly a part of the public domain prior to such patents, and if it did not so pass it remained a part of the public domain of the United States, unsurveyed and undisposed of. The Idaho court held that it passed, and

then five years later reversed such holding in the same case between the same parties, construing the same patent and in relation to the identical land. Even if the case had not involved the construction of a United States patent and the effect to be given it, we still think such action in an individual case, while the court was still adhering to the strict rule of law of the case as laid down in its previous decisions as being a limitation on the power of the court after its mandate had gone down, would be such an arbitrary departure from the established rules of judicial procedure as to amount to a denial of equal protection of the laws and of due process of law; and surely a state court cannot construe a federal grant and determine property rights thereunder, and then, after the lapse of five years, again construe such patent in the same case and reverse its former decision without making the power of such court to deal at will and arbitrarily with rights acquired under the federal government a question subject to review in this court.

We have discussed the authorities on the rule of law of the case at some length and have shown that these authorities are practically universal, that appellate courts generally, whether they may be intermediate appellate courts, courts of last resort in a state, or courts of ultimate resort, like this court and the House of Lords, have not the power to reexamine their own decisions after their mandate has gone down to the court below, and regardless of whether or not when the case comes before them they shall be of the opinion that the previous decision was erroneous, and therefore submit that this court should reverse the decision of the court below on this ground also.

DEFENDANT IN ERROR DID NOT GAIN TITLE BY ADVERSE POSSESSION.

As we have shown above, the only question really before the trial court or the Supreme Court of Idaho in this case was whether or not defendant in error had gained title to the land in controversy by adverse possession. On this point the trial court found that defendant in error had not had continuous, actual, notorious, adverse or exclusive possession of the premises for as long as five years at a time; that he did not protect the premises with substantial enclosures; that plaintiffs in error had used the premises continuously since they first acquired them, and that defendant in error at no time had any intention of acquiring title to any property of the plaintiffs herein. Based on these findings, the trial court concluded that no title by adverse possession had been made out. This question was the only question really presented to the Supreme Court of Idaho, but a careful examination of the decisions of May 17th and November 26, 1913, reveals that it was not passed upon and that, in the view taken of the case by the court, it could not be passed upon because they held that plaintiffs in error never acquired title to the land in controversy. The question, therefore, arises: What disposition should be made of the case by this court in the event that it is held that plaintiffs in error did originally acquire title to this land under their patents? And we submit that this court should, under the power conferred upon it by Sec. 709 of the U. S. Revised Statutes, award execution and enter a decree quieting the title of plaintiffs in error as prayed in their bill of complaint.

It must be conceded, of course, that this court will

not review the findings of fact made in the state court but will accept them as conclusive.

> Waters-Pierce Oil Co. vs. Texas, 212 U. S. 86; 53 L. ed. 417, at page 425.

But the record before this court shows that the findings of the trial court were made on conflicting evidence, and, that being the case, it is settled law in Idaho that the Supreme Court of that state will not disturb the findings of the trial court. To this effect are:

> Robertson vs. Moore, 10 Ida. 115; 77 Pac. 218.
> Mellen vs. Great Western Beet Sugar Co., 21 Ida. 353, 363; 122 Pac. 30.
> Weeter Lumber Co. vs. Fales, 20 Ida. 255; 118 Pac. 289.
> Miller vs. Blunck, 24 Ida. 234; 133 Pac. 383.

Hence, as these findings are conclusive, both on the state Supreme Court and this court, if the strictly Federal questions presented by this record are found to have been erroneously decided by the state court, we submit that there has been no decision by the state court of any other matter or issue which is sufficient to maintain the judgment of that court, and that this court should accordingly render the judgment here which the state court should have rendered, namely, that the decree of the trial court quieting the title of the plaintiffs in error should be affirmed.

We think this case comes clearly within the rule laid down in Murdock vs. Memphis, 20 Wall. 590-642; 22 L. ed. 429, at page 444, as to the action appropriate where the decision of the state court on a federal question is held to be erroneous. The entering of a judgment affirming the trial court in this

case seems to us to be supported by the following decisions of this court:

Fairfax vs. Hunter, 7 Cranch 603, 628; 3 L. ed. 453, 461.

Martin vs. Hunter, 1 Wheat. 304, 323, 362; 4 L. ed. 97, 102, 111.

Magwire v. Tyler, 17 Wallace 253, 293; 21 L. ed. 576, 585, 587.

Stanley vs. Schwalby, 162 U. S. 255, 283; 40 L. ed. 960, particularly pp. 968, 970.

In the case last cited, the effect of the various changes in the statute allowing writs of error to the Supreme Courts of states is commented on at some length, and we think that the case at bar comes within the rule announced in these authorities.

We submit, therefore, that the decision of the Supreme Court of Idaho should be reversed and plaintiffs in error held to be the owners of the land in dispute.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 61.

ALBERT B. MOSS AND FRANK C. MOSS, COPARTNERS UNDER THE FIRM-NAME AND STYLE OF A. B. MOSS & BRO., PLAINTIFFS IN ERROR,

vs.

ALFRED H. RAMEY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

JAMES H. RICHARDS,
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IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

A desire to correct what we deem important errors in the brief filed on behalf of defendant in error, and to extend a little further some phases of the argument discussed briefly in our original brief, prompt us to file this reply brief.

Errors in Brief of Defendant in Error.

On page 5 of the brief of defendant in error, counsel says: "At the retrial of the case at bar, the answer was amended in some particulars, *but the three defenses alleged therein*

were in effect as before." This statement seems to us directly contrary to the record, and is due, no doubt, to the fact that counsel, who now appears for the defendant in error, appeared for him on the first trial of the case, but not upon the second hearing of the case in the trial court.

The amended answer was filed in conformity with the decision of the Supreme Court of the State of Idaho on the first appeal, wherein the court decided squarely the Federal question involved, and held that the title to the lands here in dispute passed from the Federal Government under the patents to plaintiffs' predecessors in interest, and leaving for determination on the retrial but the one question of adverse possession. This not only appears from the amended answer (Trans., pp. 5-7), but also from the decision of the Supreme Court of the State on rehearing (Trans., p. 63), wherein the court says:

> "The judgment was reversed and a new trial ordered, with leave to both parties to amend their pleadings. The defendant amended his pleadings to conform to the order of the court, setting up title by adverse possession."

The matter is of importance now for two reasons:

First. Because the last decision of the Supreme Court of the State in this case is on a question which did not appear in the record, but which was eliminated from the case by the defendant amending his answer in conformity with the first decision of the court.

Second. Because, had the State Supreme Court decided the case upon the record and in favor of plaintiffs in error, no Federal question would have been involved, and the defendant in error could not have obtained a review of that decision in this court. Hence the decision of the Supreme Court of the State would in that event have been final, and it would have been the court of "final resort." And the er-

roneous doctrine upon which the State court justified its right to depart from the rule of the law of the case could in no event be applicable, for it erroneously assumed that it was not bound by its former decision, "where this court is not the court of final resort in the determination of the question presented and a writ of error may be taken to the Supreme Court of the United States" (Trans., p. 61).

Counsel for defendant in error dwells upon the fact that plaintiffs did not establish a better title than the defendant. That contention is on the erroneous assumption that the first decision of the Idaho Supreme Court in this case is without force or effect. Under that decision the Idaho court held that the title to the lands in dispute was in plaintiffs in error unless they had lost it by adverse possession. In view of that decision it was manifestly unnecessary for plaintiffs to do more than introduce the patents from the Government for the riparian lands, the official plat of the survey showing that the lands patented extended to the main channel of the river, the deeds therefor from the patentees to plaintiffs, and to disprove the alleged adverse possession by the defendant in error.

This court has settled the proposition that, as between a riparian owner and a squatter, the former has the better title to land between the meander line and the water's edge where the Government survey shows the riparian land as bordering on the water.

Whittaker *vs.* McBride, 197 U. S., 510.

Decisions on the Binding Effect of Government Surveys and Rights of Riparian Owners are Rules of Property.

The plat of the survey (Exhibit No. 5), referred to in the patents from the Government to the predecessors in interest of plaintiffs in error, shows to a demonstration that the land patented extends to the main channel of the river.

The original entrymen, and the plaintiffs in error who bought from such entrymen, clearly had the right to rely upon the Government survey and the numerous decisions of this court previously rendered, all holding that in such cases the riparian owner took to the water line and that the Government survey was binding, not only upon private parties, but also upon the Government, except in cases of actual fraud or palpable mistake. It seems to us that for this court to now establish a different rule and make it retroactive, so as to impair vested rights and titles acquired upon the faith of the former decisions of this court, will result in a grievous wrong, not only to plaintiffs in error, but to riparian owners generally throughout all the western States. The importance of the subject seems to justify our extending the argument on this point beyond what we said in our original brief.

The patents to the predecessors of plaintiffs in error were issued on March 25, 1890, and April 1, 1892, respectively, and the deeds from the patentees to plaintiffs in error were executed on July 6, 1891, and May 27, 1892, respectively, all of which appears from portions of the complaint admitted by the amended answer of defendant in error (Transcript, p. 3), from the evidence introduced (Transcript, p. 13), and from the Exhibits B, C, D, and F, attached to defendant in error's motion for diminution of the record and stipulated to be correct. At the time these patents were issued and these deeds executed and delivered it was the settled law of this court, in construing the statutes relating to patents to public land and to surveys of public land, that Government patents to land shown by the official plat of the Government survey to border on a body of fresh water, and especially on a river, conveyed title to the margin of the body of water, and not merely to the meander line shown on the plat, and that the Government had no authority to make surveys subsequent to such patent of any land between the meander line and the body of water purporting to have been meandered in the original survey.

This doctrine was established by numerous cases in this court, including the following:

St. Paul R. R. Co. *vs.* Schurmeier, 7 Wall., 272, 289; 19 L. Ed., 74, decided Jan. 25, 1869.

St. Clair County *vs.* Lovingston, 90 U. S., 46; 23 L. Ed., 59, decided Dec. 7, 1874.

Cragin *vs.* Powell, 128 U. S. 691; 32 L. Ed., 566, decided Dec. 17, 1888.

Jefferis *vs.* East Omaha Land Co., 134 U. S., 178; 33 L. Ed., 872, decided March 10, 1890.

St. Louis *vs.* Rutz, 138 U. S., 226; 34 L. Ed., 941, decided Feb. 2, 1891.

Hardin *vs.* Jordan, 140 U. S., 371; 35 L. Ed., 428, decided May 11, 1891.

Mitchell *vs.* Smale, 140 U. S., 406; 35 L. Ed., 442, also decided May 11, 1891.

In the two decisions last mentioned a number of decisions of the State courts on the same question are cited with approval, the most important of which are the following:

Middleton *vs.* Pritchard, 4 Ill., 510.
Houck *vs.* Yates, 82 Ill., 179.
Fuller *vs.* Dauphin, 124 Ill., 542.
Boorman *vs.* Sunnachs, 42 Wis., 235.
Pere Marquette Boom Co. *vs.* Adams, 44 Mich., 403.
Ridgway *vs.* Ludlow, 58 Ind., 249.
Kraut *vs.* Crawford, 18 Ia., 549.
Morgan *vs.* Reading, 3 Smedes & M. (Miss.), 366.

See also to the same effect:

Forsyth *vs.* Smale, 7 Biss., 201.

The case of Horne *vs.* Smith, 159 U. S., 40; 40 L. Ed., 68, decided June 3, 1895, several years after plaintiffs in error acquired title, was the first indication that the Government could, even in exceptional cases, order a resurvey. In that case a tract of some 700 acres had been left beyond the

meander line unsurveyed, and in the opinion of the court the surveyor had by mistake treated the bayou as the main channel of Indian River and meandered it as such.

In the cases of Kirwan *vs.* Murphy, 189 U. S., 35; 47 L. Ed., 698, and Security Land Co. *vs.* Burns, 193 U. S., 167; 48 L. Ed., 662, both of which involved the same survey, there had in fact been no actual survey, only the exterior lines of the township having been run, and the meander line shown on the plat was purely imaginary. Other cases have applied this rule where there was clear evidence of a mistake in the survey or a fraud, but the exception so engrafted upon the rule announced in the cases above cited originates with Horne *vs.* Smith, *supra*, and should not be allowed to affect titles acquired upon the faith of the rule announced in the decisions above referred to.

It is the settled law of this court, and it would seem of courts of last resort generally, that where decisions have been made in the construction of a statute or a constitutional provision and contracts entered into or rights acquired subsequent to such construction, that the construction of the statute is deemed in effect to be a part of the statute and that subsequent decisions changing such construction and overruling the prior cases have no greater effect than an amendment of the statute would have; that is to say, they operate prospectively, but not retrospectively, and only affect contracts entered into and rights acquired subsequent to the change in the decision.

The rule is thus announced in 11 Cyc., 758:

> "A decision overruling an earlier one is said to relate back to the date of the latter, except so far as the construction last given would impair the obligations of contracts and injuriously affect vested rights."

In the case of Louisiana *vs.* Pilsbury, 105 U. S., 278; 26 L. Ed., 1090, a case coming up on writ of error to the Supreme Court of Louisiana, this court said:

"The exposition given by the highest tribunal of the State must be taken as correct so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law, as to the construction of a statute. The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend that when a statute of two States, expressed in the same terms, is construed differently by their highest courts, they are treated by us as different laws, each embodying the particular construction of its own State and enforced in accordance with it in all cases arising under it. Christy *vs.* Pridgeon, 4 Wall., 197 (71 U. S., XVIII, 322); and Shelby *vs.* Guy, 11 Wheat., 367. The statute as thus expounded determines the validity of all contracts under it. A subsequent change in its interpretation can affect only subsequent contracts. The doctrine on this subject is aptly and forcibly stated by the Chief Justice in the recent case of Douglass *vs.* Pike Co., 101 U. S., 686 (XXV, 971). 'The true rule,' he observes, 'is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment.' See also Gelpcke *vs.* Dubuque, 1 Wall., 175 (68 U. S., XVII, 520); Havemeyer *vs.* Iowa Co., 3 Wall., 294 (70 U. S., XVIII, 38); Thompson *vs.* Lee Co., 3 Wall., 327 (70 U. S., XVIII, 177); Lee Co. *vs.* Rogers, 7 Wall., 181 (74 U. S., XIX, 160); Chicago *vs.* Sheldon, 9 Wall., 50 (76 U. S., XIX, 594); Olcott *vs.* Supervisors, 16 Wall., 678 (83 U. S., XXI, 382): Fairfield *vs.* Gallatin Co., 100 U. S., 47 (XXV, 544)."

The observation quoted from the case of Douglass *vs.* Pike County in the above passage are, we think, particularly pertinent and express the general rule on the subject.

The law on this subject is also well summed up in 7 R. C. L., at page 1010, where it is said:

> "The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law. To this the courts have established the exception that where a constitutional or statute law has received a given construction by the courts of last resort, and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated nor vested rights acquired under them impaired by a change of construction made by a subsequent decision. Thus, for instance, the construction of a statute of descents established by the decisions of the courts at the time of a quit-claim deed by heirs claiming under the statute becomes a part of the contract and must govern the rights of the parties as against a different construction thereafter adopted by overruling the former decisions. The true rule in such cases is held to be to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative repeal or amendment; that is to say, make it prospective but not retroactive. While there is high authority for the position that this is the only exception that should be allowed, yet some courts, in a case of unusual hardship, have extended the principle of this exception to criminal causes, and to cases where a title to real estate had vested."

This court has adhered to this doctrine in the following cases in addition to those cited in the above quotation from the Pilsbury case:

Ohio Life Insurance Co. *vs.* De Bolt, 57 U. S., 416; 14 L. Ed., 997.
Kenosha *vs.* Lamson, 76 U. S., 477; 19 L. Ed., 725.
Weightman *vs.* Clark, 103 U. S., 256; 26 L. Ed., 392.
Burgess *vs.* Seligman, 107 U. S., 20; 27 L. Ed., 359.
Anderson *vs.* Santa Anna Tp., 116 U. S., 356; 29 L. Ed., 633.
German Savings Bank *vs.* Franklin County, 128 U. S., 526; 32 L. Ed., 519.
City of Los Angeles *vs.* Los Angeles Water Co. *et al.*, 177 U. S., 558; 44 L. Ed., 886.

The case of Muhlker *vs.* N. Y. & Harlem R. R. Co., 197 U. S., 544, 577; 49 L. Ed., 872, raised a question very similar to that decided in the above cases and presented by the case at bar. This was an action for damages against the railroad company which had elevated its tracks in obedience to a statute requiring it to do so. The Supreme Court and appellate division of New York awarded damages, and this judgment was reversed by the New York Court of Appeals, whereupon plaintiff took writ of error. It appeared that the predecessor of plaintiff deeded certain streets to the city in 1825 in trust, that the same be kept open as public streets. Plaintiff acquired title in 1888, and prior to that time the New York Court of Appeals in two cases had held that abutting owners acquired as an incident or appurtenant to their title an easement of light, air, and access, and that this was true whether they acquired title from the city or deeded the streets to the city. The two decisions on this point were rendered in the Story and Lahr cases, generally referred to as the Elevated Railroad cases, and were decided in 1882 and 1887. In 1892 the statute requiring the Harlam road to elevate its tracks was passed, and this statute was pleaded by the company in justification of the action for damages. This defense was held insufficient by the court of appeals in the case of Lewis *vs.* N. Y. & H. R. Co., 162 N. Y., 202,

but in the Muhlker case that court overruled the Lewis case, and held that the statute was a command of the State and in the interest of the public, and for this reason the Elevated Railroad cases were distinguishable and the plaintiff was not entitled to recover.

Jurisdiction of the case seems to have been assumed by this court on the theory that the court of appeals had thus given effect to a statute subsequent to the acquisition of a contract right by plaintiff, but the dissenting opinion is devoted largely to the lack of jurisdiction. This court reversed the New York Court of Appeals.

After discussing the cases in the New York courts involving elevated railroads and showing that there was no valid distinction between this case and the previous cases, the court says:

> "The new principle based upon the public interest destroys all distinction between the surface of the soil of a street and the space above the surface, and, seemingly, leaves remaining no vital remnant of the doctrine of the Elevated Railroad cases. However, we need not go farther than the present case demands. When the plaintiff acquired his title, those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.
>
> "And this is the ground of our decision. We are not called upon to discuss the power, or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of State decisions, the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the Elevated Railroad cases and the doctrine they

> had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different, or that the plaintiff might have balanced the chances of the commercial advantage between the right to have the street remain open and the expectation that it would remain so, is too intangible to estimate."

A number of similar cases involving the same statute and the same railroad company were before this court shortly after, and all of these were affirmed on the authority of the Muhlker case. These are:

> Birrell and Kierns *vs.* New York & H. R. Co., 198 U. S., 390; 49 L. Ed., 1096; and
>
> Siegel *vs.* Same, Krieta *vs.* Same, O'Neil *vs.* Same, Scholz *vs.* Same, 200 U. S., 615; 50 L. Ed., 621.

In the four cases last mentioned only a memorandum decision was given, which was unanimous.

In Sauer *vs.* New York, 206 U. S., 536; 51 L. Ed., 1176, the New York statute authorized the city to build an elevated iron viaduct over 155th street after plaintiff had acquired title to land abutting on this street in 1886, which was subsequent to the first of the Elevated Railroad cases. This case holds that the Muhlker and other cases are not controlling, because the viaduct was devoted to public travel, and the decision of the Court of Appeals of New York was not inconsistent with the decision of that court in the Elevated Railroad cases. The majority of the court seems to concede the rule announced in the Muhlker case, where it says:

> "If the facts upon which this claim is based are accurately stated, then the case comes within the authority of Muhlker *vs.* New York & H. R. Co., 197 U. S., 544; 49 L. Ed., 872; 25 Sup. Ct. Rep., 522, which holds that, when the court of appeals has once interpreted the contract existing between the land owner and the city, that interpretation becomes a

> part of the contract, upon which one acquiring land may rely, and that any subsequent change of it to his injury impairs the obligation of the contract."

The dissenting opinion was on the ground that the Muhlker case was controlling.

In Ross *vs.* Oregon, 227 U. S., 150; 57 L. Ed., 458, Justice Vandevanter said that the Muhlker case "presented the question whether a state statute of 1892 impaired contractual obligations created by deeds of an earlier date," and in the note to Crigler *vs.* Shepler, 23 L. R. A. (N. S.) 500, a labored effort is made to show that the Muhlker and Sauer cases do not affect the rule announced in Central Land Co. *vs.* Laidley, 159 U. S., 103; 40 L. Ed., 91, that in order to give jurisdiction to this court on the ground of impairment of contract, the action complained of must be that of the legislature and not that of the court. In the Muhlker case, however, the statute itself was harmless, and it was the effect given to it by the New York court when it held such statute a sufficient defense to an action for damages that was the ground of the objection. On this theory, there would be jurisdiction in this court, but the actual decision was that the construction of the contract between the plaintiff's grantor and the city of New York and the general public had been so construed as to give plaintiff and other abutting owners a vested right, and such right could not be taken away from them by a subsequent statute or a subsequent decision without compensation. It accordingly seems that the Muhlker case, as stated by Justice Holmes in his dissenting opinion, was an extension of the doctrine announced by this court in Louisiana *vs.* Pilsbury, and other cases, that changes in court decisions will not be allowed to affect prior contracts or vested rights. This extension as well as the rule find authority in numerous State decisions.

The State courts have held in a number of cases that decisions overruling prior decisions will not operate retroactively upon rights vested or contracts entered into prior to

such decisions. Many of these cases are cited in the notes to the quotations given above from 11 Cyc. and 7 R. C. L., and the following are among the most important:

In Kenyon *vs.* Welty, 20 Cal., 637; 81 Am. Dec., 137, the court states that contracts and conveyances cannot be affected by a change of opinion of the court as to the law. At page 139 of 81 American Decisions the court states:

> "To establish the doctrine that all contracts made under a condition of the law, as expounded by the Supreme Court of the State, can be set aside if the court subsequently changes its opinions or corrects its error, would be attended with very serious evils. What amount of confusion and litigation would arise in the city of San Francisco alone, if all contracts and conveyances, and transfers of possession, which were made under the supposed effect of decisions of this court as to titles in that city, could now be repudiated and set aside, in consequence of those decisions having been overruled or modified! Upon this subject Chancellor Kent, in the case of Lyon *vs.* Richmond, 2 Johns. Ch., 59, says, 'Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind; and to permit a subsequent judicial decision in any one given case on a point of law to open or annul everything that has been done in other cases of the like kind for years before under a different understanding of the law, would lead to the most mischievous consequences."

In Jones *vs.* Williams, 155 N. C., 179; 36 L. R. A. (N. S.), 426, and at page 439, the court says:

> "If we have decided in any case the very question now presented contrary to what we now decide, the precedent will be controlling, so far as to protect any titles or vested interests which have been acquired upon the faith of it.
>
> "Parties have the right to act upon the decisions of this court in acquiring titles, and such titles will not be disturbed, or the parties prejudiced, by a sub-

> sequent reversal of the decision. We have so held in two recent cases: Hill *vs.* Atlantic & N. C. R. Co., 143 N. C., 539; 9 L. R. A. (N. S.), 606; 55 S. E., 854; Hill *vs.* Brown, 144 N. C., 117; 56 S. E., 693. Such a rule is based upon an ancient maxim of the law, is a just one, and should be perpetuated."

In Hill *vs.* Brown, 144 N. C., 117; 56 S. E., 693, the North Carolina court applied this doctrine to a case involving not a contract, but a title to real estate, which apparently did not rest upon the construction of a statute as the title involved in the case at bar does rest.

In another North Carolina case, that of Hill *vs.* At. & N. C. R. Co., 143 N. C., 539; 9 L. R. A. (N. S.), 606, the court discusses all the authorities on this point at some length at pages 623 to 625 of the L. R. A. Reports, and such discussion seems to be conclusive. Other cases to the same effect are:

> State *vs.* O'Neil, 147 Ia., 513; 33 L. R. A. (N. S.), 788.
> Kelley *vs.* Rhoades, 7 Wyo., 237; 51 Pac., 593; 39 L. R. A. (N. S.), 594.
> Haskell *vs.* Maxey, 134 Ill., 182; 19 L. R. A., 379.
> Harris *vs.* Jex, 55 N. Y., 421; 14 Am. Rep., 285.

In the last-mentioned case a mortgage was executed before the passage of the legal-tender act. After the decision of this court in Hepburn *vs.* Griswold, 8 Wall., 605, declaring such act void as to contracts made prior to its passage, the grantee of the mortgagor tendered payment of the debt in legal-tender notes, which the mortgagee refused. It was thereafter contended that as the Hepburn case had been reversed by Knox *vs.* Lee, 12 Wall., 457, the tender discharged the lien of the mortgage, but the New York court held that the tender was insufficient when made under the law as it stood at that time, and that the mortgagee had a

right to rely upon the decision of this court, and that such decision was the law as between these parties at that time. Other cases on this question from the State courts are discussed at length in the exhaustive opinion in Hill *vs.* At. & N. C. R. Co., 9 L. R. A. (N. S.), 623 to 625, *supra*.

We submit, therefore, that the decision of the Supreme Court of Idaho should be reversed and the decision of the trial court affirmed and plaintiffs adjudged the owners of the lands in dispute.

Respectfully submitted,

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INDEX

List of Cases Cited.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1915.

A. B. Moss and FRANK C. Moss,
Plaintiffs in Error,
vs.
A. H. RAMEY,
Defendant in Error.
} No. 61.

BRIEF OF DEFENDANT IN ERROR.

History of the Case.

This action was instituted February 23, 1905. The complaint, in effect, avers: That by reason of being owners in fee of a small acreage of land (sixty-five and three-tenths acres) adjacent to the east bank of Snake River in Idaho, the plaintiffs, as riparian owners, own to the middle of the main channel of Snake River, on account of which it is alleged they are the owners in fee of the island in controversy, embracing about 120 acres. It is accordingly prayed that defendant be required to assert title thereto,

whatever it may be, and that plaintiffs' alleged title be quieted, etc.

As disclosed by the testimony in the transcript, and practically conceded, between the island and the mainland is a channel varying from one to three hundred feet in width and in depth from four to eight feet, through which water flows constantly, except during the extreme low-water seasons.

The cause was first tried in November, 1905, defendant relying on three defenses:

(1) That plaintiffs have no right, title or interest to the land in question.

(2) That plaintiffs should not be permitted to allege ownership, for the reason that they had recognize title to the island as being in the United States; in that many years prior to the institution of this suit plaintiffs had caused the wife of one of the plaintiffs to attempt to file upon the land under the Desert Land Act, which was contested before the land office and decided adversely to plaintiffs; that the attempt to file upon the land constituted a recognition of title in the Government; and that relying thereon, and upon a decision in the land office adverse to plaintiffs, defendant Ramey had settled upon the same under the homestead laws and placed more than $2,000 improvements thereon, etc.

(3) Adverse possession for more than five years, the period prescribed by the Idaho statute of limitations.

At the first trial (1905) a judgment was entered for the defendant, dismissing the suit.

From this judgment an appeal was taken to the Supreme Court of Idaho, and March 23, 1908, the

cause was reversed and remanded for new trial, on the issue of adverse possession. (See Moss v. Ramey, 14 Idaho, 598; 95 Pac., 513).

Let it be noted that any quotations made in this brief which may appear in italics are italicized by the writer hereof.

In the majority opinion remanding the cause for re-trial on the issue of adverse possession, the court calls attention to the statute of limitations which reads:

> "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was *seised* or *possessed* of the property in question within five years before the commencement of the action."

and that defendant relied thereon as one of his defenses.

The court then observes (95 Pac., 515, column 1)—

> "The theory of the trial court was that the plaintiffs could not recover in this action because the property in controversy was unsurveyed government land and did not belong to the plaintiffs, and that the defendant entered upon said land as government land *and has had the exclusive possession thereof since the year* 1893. This case was tried and decided by the trial court upon the theory that the land in controversy was unsurveyed government land, but this court finds that the legal title was in the riparian owner. What finding the court would have made upon the

> question of adverse possession, had such court determined that the legal title was in the riparian owner, this court is unable to say. For the reasons stated in the opinion in Johnson v. Johnson, *supra,* [which held the island to belong to the abutting land owner,] this case must be reversel. And, inasmuch as the court's findings were made upon a wrong theory of the law [as to the island being public land], we deem it only just to all parties to grant a new trial in order that the court may determine whether plaintiffs' title has been divested or right of action arrested by adverse possession of the defendant."

When we take into consideration that in remanding for new trial the court held the land involved not to be public land and at the same time conceded *findings of fact* by the trial court (which were not reviewable) to such effect as would, as a matter of *law,* divest plaintiffs of the title under the statute of limitations, it becomes more than a mystery why it was deemed necessary that the cause again be tried.

The course thus adopted lends at least some color to the claim often made that a court sometimes, rather than overrule a previous erroneous decision, develops an imagination of such magnitude as materially to impair its judicial eyesight, furnishing thereby an interesting case, psycologically, in that although subconsciously wrong the more the fallacy of the position taken is urged and demonstrated, the stronger the court becomes set in its views, and the more determined to vindicate them, of which the case at bar affords a striking illustration. As illustrative of that fact in this case, see Johnson v. Hurst (10

Idaho, 303; 77 Pac., 784), where the first error occurred, followed by Scott v. Lattig (17 Idaho, 506; 107 Pac., 47), and last but not least by the opinions in the case at bar. Also for an equally effective illustration see (1) Beale v. Hite (35 Ore., 176; 57 Pac., 322); (2) Altschul v. O'Neil (35 Ore., 202; 58 Pac., 95); (3) Altschul v. Clarke (39 Ore., 315; 65 Pac., 991). The O'Neill case was reversed on the strength of Beale-Hite decision. The petition for re-hearing in O'Neill case was denied on authority of the Beale-Hite opinion, and petition for re-hearing in the Beale-Hite case, which was pending at the same time, was overruled on the precedent established in the O'Neil case. (4) Later the Oregon Supreme Court in *Boe* v. *Arnold* (54 Ore., 52; 102 Pac., 290) overruled all three of the former opinions on the strength of the decision of this honorable court (handed down prior to the Boe-Arnold case but subsequent to the other cases mentioned) in *Iowa Railway Co. v. Blumer,* 206 U. S., 482; also *Missouri Valley Land Co. v. Wiese,* 208 U. S., 234, 249; see also *Eastern Oregon Land Co. v. Brosnan,* 173 Fed., 67, in which the Boe-Arnold ruling was followed.

Issues on Retrial.

At the re-trial of the case at bar the answer was amended in some particulars, *but the three defenses alleged therein were in effect as before.* See Transcript, pp. 5-7. As disclosed by the transcript, the cause was re-tried (May, 1911) upon all the issues presented. This, however, counsel in their brief

deny, which point we will discuss later. The trial court held Snake River to be a navigable stream, but found against the defendant upon all of the issues except the defense of estoppel as to which it was painfully silent.

During the pendency of this case on re-trial in the trial court, the case of Lattig v. Scott, involving the same questions in the same river, and only about four miles below the "Ramey island" here involved, came up and the Idaho Supreme Court (17 Idaho, 506; 107 Pac., 47) held against our contention herein.

However, while the appeal from the decision of the trial court in the case here under consideration was pending before the Idaho Supreme Court, the *Lattig v. Scott* case, was (December 13, 1912), on appeal to the Supreme Court of the United States (227 U. S., 229) reversed by this honorable court, in which case it is held, in substance, that the mere fact that one might file upon a particular tract of land on the mainland, fronting upon Snake River as disclosed by the surveys, would not entitle him to an extension of the judicial arm a mile or so into the channel of the river in order to take in more land than he had filed upon.

On May 17, following, the case at bar was decided by the Idaho Supreme Court (136 Pac., 608). That court, in view of the decision of the United States Supreme Court in the Lattig-Scott case, reversed its former holding, but remanded the cause for new trial on all the issues presented by the original pleadings, or which might subsequently be presented by an amendment of the pleadings, the court holding that the question whether or not the tract of land involved *is* an island,

or detached public domain, or, as stated by the Supreme Court in Scott v. Lattig, "is 'fast dry land' should be determined upon all the evidence the parties desire to submit."

A re-hearing was had on the question of remanding the cause for a new trial. On this point and without dissent the court on re-hearing (November 26, 1913) receded from its former position and directed the cause to be "remanded to the trial court with directions for a judgment dismissing the action." Judgment was entered accordingly; hence this appeal.

Argument.

It will be observed in the opinion appealed from, the court finally concluded from the evidence before it that the "island" was *in the river* and not a part of the mainland, and accordingly a part of the public domain. Why there should have been any doubt on the subject, under the evidence presented and before the court on appeal, the court has never suggested. It had been discussed and treated as an "island" throughout the various discussions from the inception of the proceedings, and although this case in each instance was tried before a different judge, during the trial and re-trial thereof, it was in each instance found in fact to be an "island."

Bouvier, page 1685, defines "island" as "a piece of land surrounded by water." State v. Barco, 150 N. C , 792; 63 S. E., 675.

That there was adequate evidence before the appellate court to that effect, is beyond doubt, as shown by the transcript of record herein.

In this connection attention is directed to pages 13-48 of the transcript of record, noting especially the testimony of the plaintiff, A. B. Moss, including cross-examination. The facts stated by him remove all reasonable doubts on the subject.

Attention is also called to the testimony of Mr. Morton, from which it appears that he had resided in the vicinity of the land for more than 40 years, antedating the survey of the mainland upon which plaintiffs in error would have this island located. From Morton's testimony it will be observed that, except in *extreme* low-water seasons, water from Snake River has flowed through the space between the island and the mainland during each and every year for more than forty years. To the same effect is the testimony of Surveyor J. S. Milliken and Mr. Hall.

It will be observed from Exhibit B, herein, that the lots opposite the "islands" are limited to 65.30 acres, on account of which the 120-acre island is also claimed by the plaintiffs in error. A mere statement of these facts should be sufficient answer to their contention in this regard.

Res Adjudicata.

Counsel for the plaintiffs in error do not appear to distinguish between the cause here on appeal and one where the court has disposed of the case without an appeal having been taken therefrom within the statutory time. Such for example as would be the O'Neill case discussed on page 5, *supra,* were it brought before this court, either in that or some

other proceeding, after the statutory time of appeal from the *final* judgment had expired. Counsel appear entirely to overlook the distinction between that class of cases and one like the case at bar, which is still within the jurisdiction of the court.

When this cause first came to the Idaho Supreme Court, in 1908, that court reversed the decision of the trial court (which was in defendant's favor) and remanded the case for new trial because the findings of the lower court had been made, as there assumed, "upon a wrong theory of the law." (Moss v. Ramey, 14 Idaho, 598, 606; 95 Pac., 513).

Appellants in the case at bar claim that this decision of the Idaho Supreme Court was such a *final* decision as rendered the question at issue "res adjudicata," so that when the case came to the Idaho Supreme Court a second time that court had no power to render a different decision.

The rule of res adjudicata cannot apply unless the decision in question completely disposes of the cause and puts an end to the litigation between the parties on that subject matter. Unless a final judgment or decree is rendered in a suit, the proceedings in the same are never regarded as a bar to a subsequent action.—Encyc. of U. S. Reports, Vol. 10, p. 774.

A judgment reversing the judgment of an inferior court and remanding the cause for further proceedings, does not do this. See County of St. Clair v. Lovingston (18 Wall., 628), in which it is said:

> "No judgment is final which does not terminate the litigation between the parties to the suit. From the record brought up to us it appears that the Supreme Court reversed the

> judgment which had been obtained in the Circuit Court and remanded the cause for such other and further proceedings as to law and justice shall appertain. The issue between the parties may be again tried in the circuit court, and another judgment may be recovered which may be removed to the Supreme Court for revision. Consequently, then, there has been *no final determination* of the case."

This decision has been cited and reaffirmed in the subsequent cases of Parcels v. Johnson, 20 Wall., 654; 22 L., 410; McComb v. Commissioners, 91 U. S., 2; 23 L., 185; Bostwick v. Brinkerhoff, 106 U. S., 4; 27 L., 74; 1 S. Ct., 16; and Great Western Tel. Co. v. Burnham, 162 U. S., 342; 40 L., 993; 16 S. Ct., 851. See also United States v. Beatty (232 U. S., 463), which was decided in 1914.

In the case of Atlantic Coast Line R. R. Co., v. McElmurray Bros. (80 S. E., 680), it was held that where a new trial is awarded on the ground that the evidence demanded a verdict for defendant, the case stands for trial *de novo*, and the fact that the plaintiff relies for recovery upon the same allegations does not make appropriate a plea of "res adjudicata."

The case at bar was *not finally* decided by the Idaho Supreme Court in 1908, on its first hearing before that court. It was reversed and remanded for new trial, because the trial court's findings were supposedly made on "a wrong theory of the law." (Moss vs. Ramey, 14 Idaho, 598, 606; 95 Pac., 513.)

According to the decision of this honorable court

in County of St. Clair vs. Lovingston, *supra*, and subsequent cases cited to the same effect, that reversal and remanding did not constitute a *final* disposition *of the cause, which final disposition* is necessary to render the point *res adjudicata.*

By remanding the cause for new trial the Idaho Supreme Court did not relinquish its jurisdiction. *The cause remained in the jurisdiction of that court from the time suit was instituted in* 1905 *until final decree was rendered in* 1913.

The Supreme Court of the United States will not review on writ of error a case in which a federal question is involved unless the decision of the state court is *final.* Bostwick vs. Brinkerhoff (106 U. S., 3). In this case it is said:

> "The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered. Whiting vs. Bank of United States, 13 Pet., 6; Forgay vs. Conrad, 6 How., 201; Craighead vs. Wilson, 18 id., 199; Beebe vs. Russell, 19 id., 283; Bronson vs. Railroad Co., 2 Black., 524; Thomson vs. Dean, 7 Wall., 342; St. Clair vs. Lovingston, 18 id., 628; Parcels vs. Johnson, 20 id., 653; Railroad Co. vs. Swasey, 23 id., 405; Crosby vs. Buchanan, id., 420; Commissioners vs. Lucas, 93 U. S., 108. It has not always been easy to decide

> when decrees in equity are final within this rule, and there may be some apparent conflict in the cases on that subject, but in the common-law courts the question has never been a difficult one. If the judgment is not one which disposes of the whole case on its merits, it is not final. *Consequently it has been uniformly held that a judgment of reversal with leave for further proceedings in the court below cannot be brought here on writ of error.* Brown vs. Union Bank, 4 How., 465; Pepper vs. Dunlap, 5 id., 51; Tracy vs. Holcombe, 24 id., 426; Moore vs. Robbins, 18 Wall., 588; McComb vs. Knox County, 91 U. S., 1; Baker vs. White, 92 ld., 176; Davis vs. Crouch, 94 id., 514."

The cases cited by appellants in support of the rule of *res adjudicata* are cases in which the prior decision was a final determination of the case. The case at bar, however, has never been finally disposed of, and is still within the jurisdiction. Hence the rule of *res adjudicata* cannot be applicable.

For other reasons the doctrine of *res adjudicata* is not applicable.

So far as the federal question in the case at bar was concerned, *the Idaho Supreme Court was not a court of final resort,* and a writ of error could be taken to the Supreme Court of the United States. It is the duty of the state Supreme Court to follow the decisions of the federal Supreme Court on federal questions. In this connection see statement in the opinion rendered when this cause was before the Idaho Supreme Court for the second time (Moss vs. Ramey, 136 Pac., 608, 609).

The Supreme Court of the United States is not bound by a prior decision in a state court involving a federal question.

In the case of United States vs. Denver & Rio Grande R. R. Co. (191 U. S., 84, 93), Mr. Justice Brown, speaking for the court, said:

> "While the Supreme Court of New Mexico upon this second writ of error may have considered itself bound by its decision upon the question here involved upon the first writ as the law of the case, *we are not ourselves restrained by the same limitation.* As its judgment upon the first writ was merely for a reversal of the court below and for a new trial, such judgment, not being final, could not be made the subject of a writ of error from this court."

In the recent case of Messenger vs. Anderson (225 U. S., 436), in 1912, which appears to be the last word of this court on the point, it is said:

> "In the absence of statute the phrase, *law of the case,* as applied to the effect of previous orders on the later action of the court rendering them in the same case, *merely expresses the practice of courts generally* to refuse to reopen what has been decided, *not a limit to their power.* King vs. West Virginia, 216 U. S., 92, 100; 54 L. Ed., 396, 401; 30 S. Ct. Rep., 225; Remington vs. Central R. R. Co., 198 U. S., 95, 99, 100; 49 L. Ed., 959, 963; 25 S. Ct. Rep., 577; Great Western Tel. Co. vs. Burnham, 162 U. S., 339, 343; 40 L. Ed., 991, 993; 16 S. Ct. Rep., 850."

See also Zeckendorf vs. Steinfeld (225 U. S., 445), in which it is held that whatever effect the decision of the Supreme Court of a territory may have, as the law of the case, on the lower court or on the supreme court, prior to an appeal to this court, it is not the law of the case for this court.

In Chesapeake & O. R. R. Co. vs. McKell (209 Fed., 514), it is observed:

> "We find no occasion to doubt the abstract power of an appellate court, upon a second view, to reach a result inconsistent with its decision on the first review of the same case (Messinger vs. Anderson, 225 U. S., 436, 444; 32 Sup. Ct., 739; 56 L. Ed., 1152), but this is a power to be exercised very sparingly, and only under extraordinary conditions. The practice that such a decision be treated as the law of the case, to be followed by the Appellate Court itself as well as by the trial court, is most salutary, and its violation (save in rare exceptions) would intolerably unsettle all litigation."

Even if it be conceded (and it is not here conceded) that, as observed above, such should be or is the rule only in "rare exceptions," the case at bar comes within the "exceptions." The most diligent explorer into the history of adjudicated cases will not find a case more entitled to be one of the "rare exceptions" justifying extraordinary relief available to the highest courts than the one at bar.

In connection with the subject of "*res adjudicata*," it may be pertinent to quote the language of a very recent work (now in process of publication), as follows:

"The better rule, and that more in accord with justice, however, is that though ordinarily a question considered and determined on the first appeal is deemed to be settled and not open to re-examination on a second appeal, it is not an inflexible rule, and if the prior decision is palpably erroneous it is competent for the court to correct it on the second appeal. This may be said to be the view which has for its support the trend of modern authority, and the courts have expressed their intention not to extend the application of the doctrine of the 'law of the case' beyond the cases in which it has heretofore been held to apply. *There would seem to be no question but that an appellate court may, on a second appeal, correct the entry of the former judgment so as to make it express the true decision of the case.*"

Ruling Case Law, Vol. 2, Sec. 188.

On the authority of the cases cited above, it is submitted:

First, that the doctrine of *res adjudicata* can have no application to the case at bar, because the case at bar was not finally decided by the Idaho Supreme Court until 1913 (Moss vs. Ramey, 136 Pac., 608), *but remained in the jurisdiction of that court from the beginning of the suit until that time.* And the same rule is applicable whether the first decision (14 Idaho, 598; 95 Pac., 513) was appealable or not, for the case has never left the hands of the court; it remained in its jurisdictional palm until the decision here on writ of error was rendered.

Second, that the rule of *res adjudicata* does not apply, because there is a federal question involved

and the Idaho Supreme Court was not the court of final resort, and this honorable court (as held in cases above cited) is not bound by a prior decision of the state court on a federal question.

Pleadings a Question of Practice.

Counsel insist that because in the amended answer we deny that plaintiffs are *now* the owners of the island, that such form of denial admits previous ownership. But this is a *question of practice* which the state Supreme Court in the case at bar held sufficient to present an issue as to the title, in which the *onus* is upon plaintiffs. Questions of practice as interpreted by the state court, *as in this instance,* are not reviewable by this court on appeal. Duncan v. United States, 7 Pet., 435, 451; Johnson v. Drew, 171 U. S., 93, 98.

Adverse Possession.

It is laboriously contended and argued by counsel for the plaintiffs in error, that on retrial the cause was tried only upon one issue and that the pleadings were amended to cover the one issue only. Just why this contention is made, we are at loss to understand, and direct the court's attention to pages 5, 6 and 7 of the transcript of record.

True, as counsel state on page 42 of their brief, paragraphs 1, 3 and 4, of plaintiff's complaint are not denied. These paragraphs amount merely to an *opinion* that plaintiffs in error are the owners of the "Ramey island" on account of the mesne convey-

ances through which the title is alleged to have been deraigned to the lots described. It will be observed, however, that their alleged title to the land in controversy is specifically and properly denied in accordance with the statutes of Idaho on procedure.

This denial is followed, first, by a plea of adverse possession; second, by a plea of estoppel, on the ground that plaintiffs had induced the wife of one of the plaintiffs to enter the island under the Desert Land Act, which entry was decided adversely to them, the application being rejected on the ground that the land was not desert land.

The transcript of record, pages 13 to 48, discloses much of the testimony given in defendant's behalf. Defendant's first defense consisted of a denial of plaintiffs' title, *the burden of proof of which is on the plaintiff*. No rule is better settled than the one stated by the Idaho Supreme Court in the decision of this cause, from which this appeal is taken, that since plaintiffs have brought this action to quiet their title *"their right to recover depends upon the strength of their own title and not upon the weakness of the defendant's title. Before the defendant is required to defend his claim to the island, the plaintiffs must establish their right thereto, and in so doing must establish their title on the ground that their predecessor in interest acquired title to said land by reason of the patent issued to him by the government for the lots bordering on Snake River opposite said island."*

See also McNitt vs. Turner, 16 Wall., 362; Watts vs. Lindsey, 7 Wheat., 161; Fussell vs. Gregg, 113 U. S., 550.

It is further stated by the court that under the decision in the *Scott-Lattig* case the plaintiffs cannot establish their title to said land. That being true, they could not have their title quieted in this action, for the reason that under the facts and the law they have no title, and there is "no doubt but that under the pleadings and decision in this case a federal question is involved, and that the final decision of this court may be reviewed by the Supreme Court of the United States upon a writ of error from that court," thereby making it "a useless act to remand the case for a new trial" as directed in the former opinion.

The foregoing statement of the law by Mr. Justice Sullivan, who wrote the opinion on rehearing (and who dissented in all former opinions holding in favor of the plaintiff's contention), is followed by this statement in regard to the rule of law of the case:

> "If this land in controversy is still a part of the public domain, as is undoubtedly the case under the decision of the Supreme Court of the United States in the Scott-Lattig case, it is clearly our duty to take notice of that fact as it appears in the case and decide accordingly, even though we have previously decided to the contrary. This case turns solely on a federal question, and we are bound to follow the decisions of the federal Supreme Court as we understand them."

Counsel for plaintiffs in error present here the question of adverse possession, to the effect that de-

fendant under the showing made has not acquired title in that manner. Under the findings of the Supreme Court of the State of Idaho, there can be but one conclusion upon this point. If it be held that plaintiffs have had the title in fee to the mainland and the land in controversy, since November, 1890, as alleged in the complaint, which is found in paragraph 2 of the findings of the trial court, then as stated by the Supreme Court of Idaho (95 Pac., 513):

> "The defendant also relies upon the defense that the plaintiffs and their predecessors in interest have not been seised or possessed of the premises in controversy within five years prior to the commencement of said suit, and as a result are barred by the statute of limitations. This defense is based upon the statute which provides that no recovery of real property can be maintained unless it appears that the plaintiffs, their ancestors, predecessors or grantors, were seised or possessed thereof within five years before the commencement of such action. Rev. Stat., 1887, §4036. The defendant claims that he has been in the continuous, actual, open, adverse, notorious and exclusive possession of the property in controversy since the year 1893; and under this allegation of the answer the court found the same to be true, and found that said defendant has held said property under claim of ownership exclusively against the plaintiffs and their predecessors in interest continuously and against all other persons whatsoever since the year 1893, and has had said property inclosed by good and substantial inclosure, and has cultivated the same

during each year since 1893. The defendant contends that the same facts which justified the court in making the finding that he had been in the exclusive possession of said property for more than five years last past constituted a disseisin of said property, and by reason of such fact that the plaintiffs cannot maintain this action because they and their predecessors in interest have not been seised or possessed of said property within five years before the commencement of this action."

It follows, therefore, that taking either horn of the dilemma, the plaintiffs must fail, for the following reasons:

First, if they are not owners of the property in controversy then being required to rely upon the strength of their own title and not on the weakness of defendant's, they must fail.

Second, if more than 5 years before the institution of the suit they had been owners *but were not seised or possessed* of the *same within the period* prescribed by the statute of limitations, which is to the effect that it must appear that they are seised or possessed of land five years prior to the action, they must fail.

In this connection also let it be noted that the language used in the statute of limitation of *the Idaho Code does not require that the defendant must necessarily have held actual, open and adverse possession during that period,* which fact, however, is practically conceded *and so stated in the opinion of the Supreme Court above referred to,* but does re-

quire that plaintiff must have been seised or possessed thereof within the statutory period; the *onus* being upon the plaintiff to establish that important fact. The statement of facts on this point by the Idaho Supreme Court conclusively settles the question on this appeal.

Findings of Fact Binding Upon This Court.

The finding of facts made in the highest court of a state is binding upon the Supreme Court of the United States, and will be the basis of decision there.

Adams vs. Church, 193 U. S., 510; *Egan vs. Hart,* 165 U. S., 188.

In chancery cases the rule is the same.

Not only the very nature of a writ of error, but also the rulings of this court from the beginning, make it clear that on error to a state court in a suit in equity, as in a case at law, when the facts are found by the court below, this court is concluded by such finding.

Encyc. of U. S. Reports, Vol. 1, p. 781.

Egan vs. Hart, 165 U. S., 188, 189; 41 L. Ed., 680.

Bement vs. Nat. Harrow Co., 186 U. S., 70, 83; 46 L. Ed., 1058.

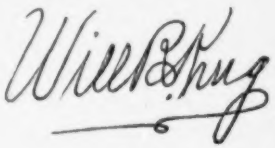
Dower vs. Richards, 151 U. S., 658, 666; 38 L. Ed., 305.

"It is well settled that the findings of fact in the state courts are, on a writ of error, conclusive with us."—*Jenkins vs. Neff,* 186 U. S., 230, 235.

"No point has been more repeatedly and authoritatively settled than that this court will not, upon a writ of error, revise or give judgment as to the facts, but takes them as found by the court below, and as they are exhibited by the record."—Encyc. of U. S. Reports, Vol. 1, p. 1005, and cases cited in note.

A finding of court is entitled to the same weight as a verdict of a jury, and is conclusive, on appeal, unless plainly against the evidence.—*Cliff vs. United States*, 195 U. S., 159.

It is respectfully submitted that under any view that may be taken of this case, the *final* decision of the Supreme Court of Idaho from which this appeal has been taken, should be affirmed.



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MOSS *v.* RAMEY.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 61. Argued December 9, 1915.—Decided January 10, 1916.

The inference naturally arising from the silence of the field notes and plat that there was no island at the time of the survey, or if any, only one of inconsiderable area and value, is refutable; and in this case the evidence does refute such inference and demonstrates the existence of the island in its present condition at the time of the survey.

An error of the surveyor in failing to extend a survey over an island in a river does not make it any the less a part of the public domain.

Fast dry land, which is neither a part of the bed of a river nor land under water, being part of the public domain within the Territory of Idaho did not pass to the State on admission to the Union but remained public land as before.

Patents to lots of land abutting on a river do not include actual islands of fast dry land and of stable foundation lying between the lots and the thread of the stream. *Whitaker* v. *McBride*, 197 U. S. 510, distinguished.

An appellate court of a State may, without violating the Fourteenth Amendment, correct its interlocutory decision upon a first appeal when the same case with the same parties again comes before it; and whether this may be done in a particular case is a local question upon which the decision of the highest court of the State is controlling here.

25 Idaho, 1, affirmed.

THE facts, which involve the title under patents of the United States to an unsurveyed island in Snake River between the States of Oregon and Idaho, are stated in the opinion.

Mr. Oliver O. Haga, with whom *Mr. James H. Richards* and *Mr. McKeen F. Morrow* were on the brief, for plaintiffs in error:

Whether title to land which has once been the property of the United States has passed from the Federal Government, must be resolved by the laws of the United States. *Wilcox* v. *Jackson*, 13 Pet. 498–517; *Irvine* v. *Marshall*, 20 How. 558; *Gibson* v. *Choteau*, 13 Wall. 92.

When land patented by the United States Government under the public land laws is shown by the official plat of the survey as bordering on a fresh water river, the body of water whose margin is meandered is the true boundary and not the meander line. *Hardin* v. *Jordan*, 140 U. S. 371, 380; *St. Clair Co.* v. *Lovingston*, 90 U. S. 46; *Mitchell* v. *Smale*, 140 U. S. 406; *St. Paul & P. R. R.* v. *Schurmeier*, 74 U. S. 272; *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178; *Middleton* v. *Pritchard*, 4 Illinois, 514; *Houck* v. *Yates*, 82 Illinois, 179; *Fuller* v. *Dauphin*, 124 Illinois, 542; *Knudson* v. *Omason* (Utah), 27 Pac. Rep. 250.

One of the important rights of a riparian owner is access to the navigable part of a river from the front of his land.

St. Louis v. *Rutz*, 138 U. S. 226; *Dutton* v. *Strong*, 1 Black, 23; *St. Paul & P. R. R.* v. *Schurmeier*, 7 Wall. 272; *Yates* v. *Milwaukee*, 10 Wall. 497.

When land is bounded by a river, the water is appurtenant to the land and constitutes one of the advantages of its situation, and a material part of its value, and enters largely into the consideration for acquiring it, and for the Government to later survey and dispose of the strips of land that were left between the meander line and the body of water purporting to have been meandered, is an injustice to the original entryman or patentee who acquired the meandered lots under the belief that they extended to the river or other body of water, and a resurvey and sale of such land should not be permitted except in case of fraud or palpable mistake in the original survey. Cases *supra*, and see *Lamprey* v. *State*, 52 Minnesota, 181; *Grand Rapids &c. R. R.* v. *Butler*, 159 U. S. 87; *Chandos* v. *Mack*, 77 Wisconsin, 573.

Except in cases of omission by accident, fraud or palpable mistake, the United States has no authority to make surveys, subsequent to patent to the upland, of any land between the meander line and the body of water purporting to have been meandered in the original survey. Cases *supra*, and see *Moore* v. *Robbins*, 96 U. S. 530, 533; *Franzini* v. *Layland*, 120 Wisconsin, 72; *Davis* v. *Wiebold*, 139 U. S. 507; *St. Louis Smelting Co.* v. *Kemp*, 104 U. S. 636, 646; *Lindsey* v. *Hawkes*, 2 Black. 554, 560; *Cragin* v. *Powell*, 128 U. S. 691; *Webber* v. *Pere Marquette Co.*, 62 Michigan, 635; *Shufelt* v. *Spaulding*, 37 Wisconsin, 662; *State* v. *Lake St. Clair Fishing Club*, 127 Michigan, 587.

Where the Government has never complained of either fraud or mistake in the original survey, a squatter on land between the meander line and the water cannot be heard to complain that the Government has parted with title to a larger acreage than it received pay for, and as be-

tween such squatter and the riparian owner, the latter has the better title. *Whitaker* v. *McBride*, 197 U. S. 510.

Where a survey and patent show a river to be one of the boundaries of the tract, it is a legal deduction that there is no vacant land left for appropriation between the river and the river boundary of such tract. Cases *supra*, and see *Churchill* v. *Grundy*, 5 Dana, 100; *St. Louis* v. *Rutz*, 138 U. S. 243; *Ross* v. *Faust*, 54 Indiana, 475; 23 Am. Rep. 658; *Turner* v. *Parker*, 14 Oregon, 341; 12 Pac. Rep. 496.

Where surveys have been made and lands entered in reliance upon the decisions of this court that the riparian owner took to the water purporting to have been meandered, such decisions will be held to constitute rules of property, and the riparian owner will be protected accordingly.

Material allegations of the complaint not denied by the answer are deemed admitted, and such admissions are conclusive on appeal. Section 4217, Idaho Rev. Codes; *Broadbent* v. *Brumback*, 2 Idaho, 366; *Knowles* v. *New Sweden*, 16 Idaho, 217; 2 Ency. Law and Pr. 179; *Tex. & Pac. Ry.* v. *Abilene Cotton Co.*, 204 U. S. 426; *Eakin* v. *Frank*, 21 Montana, 192.

The claim that the land in controversy was still part of the public domain was not raised in the trial court on the second trial, and the Supreme Court of Idaho had no power to reverse that court and determine that it was public land and that title had not passed to plaintiffs in error. Sections 3817, 4824, Idaho Rev. Codes; *Lamkin* v. *Sterling*, 1 Idaho, 120, 123; *Miller* v. *Donovan*, 11 Idaho, 545; *Medbury* v. *Maloney*, 12 Idaho, 634; *Marysville* v. *Home Ins. Co.*, 21 Idaho, 377; *Pomeroy* v. *Gordan*, 25 Idaho, 279.

The action of the Supreme Court in going entirely outside the record to determine that the land in controversy

was public land and that title had not passed to plaintiffs in error was a denial of the equal protection of the laws and of due process of law. 5 Ency. U. S. Sup. Ct. Rep., p. 618.

Where a question necessary for the determination of a case has been presented to and decided by an appellate court, such decision becomes the law of the case in all subsequent proceedings in the same action and is a final adjudication, from the consequences of which the court cannot depart nor the parties relieve themselves. *Westerfield* v. *N. Y. Life Ins. Co.*, 157 California, 339; *Lindsay* v. *People*, 1 Idaho, 438; *Hall* v. *Blackman*, 9 Idaho, 555; 75 Pac. Rep. 608; *Hunter* v. *Porter*, 10 Idaho, 86; 77 Pac. Rep. 439; *Steve* v. *Bonners Ferry Co.*, 13 Idaho, 384, 394; *Gerber* v. *Nampa*, 19 Idaho, 765; *Nampa* v. *Irrigation Dist.*, 23 Idaho, 422; *Himely* v. *Rose*, 5 Cr. 313; *Skillern* v. *May*, 6 Cr. 267; *Martin* v. *Hunter*, 1 Wheat. 374; *Browder* v. *McArthur*, 7 Wheat. 55; *The Santa Maria*, 10 Wheat. 430; *Sibbald* v. *United States*, 12 Pet. 488; *Washington Bridge Case*, 3 How. 411; *Sizer* v. *Many*, 16 How. 98; *Roberts* v. *Cooper*, 20 How. 467; *Cook* v. *Burnley*, 76 U. S. 672; *Magwire* v. *Tyler* (*Tyler* v. *Magwire*), 17 Wall. 253, 294; *Supervisors* v. *Kennicott*, 94 U. S. 498; *The Lady Pike*, 96 U. S. 461; *Ames* v. *Quimby*, 106 U. S. 342; *Clark* v. *Keith*, 106 U. S. 464; *Chaffin* v. *Taylor*, 116 U. S. 567; *Barney* v. *Winona Ry.*, 117 U. S. 231; *Gaines* v. *Caldwell*, 148 U. S. 228; *Re Sanford Fork Co.*, 160 U. S. 247; *Gt. West. Tel. Co.* v. *Burnham*, 162 U. S. 339; *Thompson* v. *Maxwell Land Grant Co.*, 168 U. S. 456; *Hunt* v. *Ill. Cen. Ry.*, 184 U. S. 77; *United States* v. *Camou*, 184 U. S. 572; *Mutual Life Ins. Co.* v. *Hill*, 193 U. S. 551; *Richardson* v. *Ainsa*, 218 U. S. 289; *Balch* v. *Haas*, 73 Fed. Rep. 974; *Hailey* v. *Kirkpatrick*, 104 Fed. Rep. 647; *Montana Min. Co.* v. *St. Louis Min. Co.*, 147 Fed. Rep. 897; *Taenzer* v. *Chi., Rock. Isld. Ry.*, 191 Fed. Rep. 543.

This rule applies regardless of whether the previous decision is right or wrong and is a limitation on the court's power and not a mere rule of practice. Cases *supra*, and see *Chaffin* v. *Taylor*, 116 U. S. 567; *Gaines* v. *Caldwell*, 148 U. S. 228; *Hunter* v. *Porter*, 10 Idaho, 86; *Leese* v. *Clark*, 20 California, 388, 416.

The cases from this court relied upon by the Supreme Court of Idaho to justify its departure from the rule of law of the case do not sustain its action. *United States* v. *D. & R. G. Ry.*, 191 U. S. 83; *Zeckendorf* v. *Steinfeld*, 225 U. S. 445; *Messinger* v. *Anderson*, 225 U. S. 436; *Ches. & Ohio Ry.* v. *McCabe*, 213 U. S. 207; *King* v. *West Virginia*, 216 U. S. 92; *Remington* v. *Cent. Pac. Ry.*, 198 U. S. 95; *Gt. West. Tele. Co.* v. *Burnham*, 162 U. S. 339; *Nor. Pac. Ry.* v. *Ellis*, 144 U. S. 458.

The rule of law of the case applies to intermediate appellate courts and to the highest courts of a State where Federal questions are involved, and if, pending a second appeal, the rule of law on which such a decision was based is changed by a higher court, the lower court has no power to reverse or modify its original decree. *Silva* v. *Pickard*, 14 Utah, 245; 47 Pac. Rep. 144; *Dist. of Col.* v. *Brewer*, 32 App. D. C. 388; *Ogle* v. *Turpin*, 8 Ill. App. 453; *Herr* v. *Graden* (Colo.), 127 Pac. Rep. 319; *Bank of Commerce* v. *State*, 96 Tennessee, 591.

Under the laws of Idaho, the remittitur from the Supreme Court went down twenty days after the decision on the first appeal, and as such decision construed a Federal grant and determined the rights of plaintiffs in error to the land in controversy, the judgment of that court became final upon the expiration of the two years allowed for issuance of writ of error from this court, and the Idaho Supreme Court was without power on a subsequent appeal five years later to reverse such judgment, and its action in doing so impairs a vested right under such Federal grant. Section 3818, Idaho Rev. Codes;

Rules 60 and 61, Supreme Court of Idaho; *Moss* v. *Ramey*, 14 Idaho, 598; 25 Idaho, 1.

The findings of the trial court on the issue of adverse possession were conclusive both on this court and the state Supreme Court, and the Federal questions in this case being decisive of the whole controversy, this court, if it finds the decision of the state court on such questions erroneous, should order the affirmance of the decision of the trial court. *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86; *Robertson* v. *Moore*, 10 Idaho, 115; 77 Pac. Rep. 218; *Mellen* v. *Gt. West. Sugar Co.*, 21 Idaho, 353, 363; *Weeter Lumber Co.* v. *Fales*, 20 Idaho, 255; *Miller* v. *Blunck*, 24 Idaho, 234; *Murdock* v. *Memphis*, 20 Wall. 590, 642; *Fairfax* v. *Hunter*, 7 Cr. 603, 628; *Martin* v. *Hunter*, 1 Wheat. 304, 323, 362; *Magwire* v. *Tyler*, 17 Wall. 253, 293; *Stanley* v. *Schwalby*, 162 U. S. 255, 283.

Mr. Will R. King for defendant in error.

Mr. Justice Van Devanter delivered the opinion of the court.

This is a suit to quiet the title to an unsurveyed island in the Snake River, a navigable stream, the thread of which at that place is the dividing line between the States of Oregon and Idaho. The island lies between the main channel and the bank on the Idaho side and is separated from the latter by a lesser channel from 100 to 300 feet in width which carries a considerable part of the waters of the river, save when it is at its lower stages. The plaintiffs hold patents from the United States, issued in 1890 and 1892, for certain lots on the Idaho side opposite the island and claim it under these patents, while the defendant insists that it remains public land and that he has a possessory right to it acquired by settling thereon in 1894 and subsequently improving and cultivating it.

The island contains about 120 acres, has banks rising abruptly above the water, is of stable formation, has a natural growth of grass and of trees suitable for firewood, and evidently has been in its present condition since long before the adjacent lands on the Idaho side were surveyed, which was in 1868. The field notes and plat represented the survey as extending to the river, but made no mention of the island. They also represented the lots or fractional tracts immediately opposite the island as containing 110.40 acres. The patents under which the plaintiffs claim described the lots by giving the numbers assigned and the acreage accredited to them on the plat and then saying "according to the official plat of the survey of the said land returned to the General Land Office by the Surveyor General." The trial court concluded that the island remained unsurveyed public land and that the plaintiffs' lands extended only to the river, and rendered judgment against the plaintiffs. They appealed and the Supreme Court of the State held, one member dissenting, that the patents passed the title not only to the lots, as shown on the plat, but also to all islands lying between them and the thread of the stream. The judgment was accordingly reversed and a new trial ordered to determine whether the plaintiffs had lost title to the island through adverse possession. 14 Idaho, 598. Upon the new trial judgment was given for the plaintiffs and the defendant appealed. The Supreme Court, in deference to our intermediate decision in *Scott* v. *Lattig*, 227 U. S. 229, then recalled its decision upon the first appeal, reversed the judgment rendered upon the second trial and remanded the cause with a direction to dismiss it. 25 Idaho, 1. The plaintiffs bring the case here.

While the inference naturally arising from the silence of the field notes and plat is that the island was not there at the time of the survey, or, if there, was a mere sand bar or of inconsiderable area and value, what is shown and

conceded respecting its stable formation, elevation, size and appearance, completely refutes this inference and demonstrates that the island was in its present condition at the time of the survey and when Idaho became a State, which was twenty-two years later.

Thus the facts bearing on the status of the island and the operation of the patents are essentially the same as in *Scott* v. *Lattig*, and, in view of what was there held, it suffices to say: The error of the surveyor in failing to extend the survey over the island did not make it any the less a part of the public domain. It was fast dry land, and neither a part of the bed of the river nor land under water, and therefore did not pass to the State of Idaho on her admission into the Union but remained public land as before. The descriptive terms in the patents embraced the lots abutting on the river, as shown on the plat, but not this island lying between the lots and the thread of the stream. *Chapman & Dewey Lumber Co.* v. *St. Francis Levee District*, 232 U. S. 186; *Gauthier* v. *Morrison*, 232 U. S. 452; *Producers Oil Co.* v. *Hanzen*, 238 U. S. 325. The claim that the island passed under the patents is therefore ill founded. The case of *Whitaker* v. *McBride*, 197 U. S. 510, upon which the plaintiffs rely, is distinguishable in that what was there claimed to be an island contained only 22 acres and was not shown to be of stable formation, and the Land Department had repeatedly refused to treat it as public land.

It is contended that the decision upon the first appeal became the law of the case and that by recalling that decision when considering the second appeal the court infringed upon the due process of law clause of the Fourteenth Amendment. The contention must fail. There is nothing in that or any other clause of the Fourteenth Amendment which prevents a State from permitting an appellate court to alter or correct its interlocutory decision upon a first appeal when the same case with the same

parties comes before it again; and whether this is permitted is a question of local law, upon which the decision of the highest court of the State is controlling here. *King* v. *West Virginia*, 216 U. S. 92, 100; *John* v. *Paullin*, 231 U. S. 583.

It also is contended that under the due process of law clause of such Amendment the court was not at liberty upon the second appeal to change its first decision, because after the case was remanded for a new trial the defendant acquiesced in that decision by an amendment to his answer completely eliminating from the case all controversy respecting the status of the island and the operation of the patents. This contention is without any real basis in the record. The original answer is not before us but the amended one is, and it, in addition to otherwise traversing the plaintiffs' allegation of ownership, expressly denies that they or either of them "have any right, title or interest whatever in any portion" of the island. And examining the evidence taken on the second trial we find that the defendant was then still insisting that the island was public and not private land. It is idle therefore to claim that the point involved in the first decision was completely eliminated from the case between the two appeals. Whether, if the record were otherwise, it could be said that there was an abuse of due process need not be considered.

Judgment affirmed.